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No. 91 -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RIESBECK FOOD MARKETS, INC.,
and ELM GROVE PROPERTIES,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL UNION 23, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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July 2, 1991

QUESTION PRESENTED

In *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), the Court held that a state court trespass action against picketing on private property by nonemployee union members was not preempted by the National Labor Relations Act, where the union had not invoked the jurisdiction of the National Labor Relations Board by filing an unfair labor practice charge against the employer.

The question presented in this case was addressed but left unresolved by contradictory concurring opinions in Sears: Whether the mere filing of a charge against an employer with the General Counsel of the National Labor Relations Board preempts the employer's state court trespass action against a union's trespassory informational picketing and handbilling, thereby leaving the employer, pending the exhaustion of NLRB procedures, with no federal or state forum in which to vindicate its property rights.

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STATUTES:

National Labor Relations Act, as amended 29 U.S.C. § 151 *et seq.* . . . . . *passim*

28 U.S.C. § 1257 2

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OCTOBER TERM, 1991

RIESBECK FOOD MARKETS, INC.,
and ELM GROVE PROPERTIES,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL UNION 23, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioners[1] pray for a writ of certiorari to review a decision of the Supreme Court of Appeals of West Virginia.

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[1] In compliance with Rule 29.1, Rules of the Supreme Court of the United States, petitioners, Riesbeck Food Markets, Inc., an Ohio corporation, and Elm Grove Properties, a general partnership, do not have any parent or subsidiary companies.

Respondents, defendant-appellant parties to the proceeding in the Supreme Court of Appeals of West Virginia, whose judgment is sought to be reviewed, are United Food and Commercial Workers, Local Union 23; Carl Huber, as President of United Food and Commercial Workers, Local Union 23; James Bono, as Secretary-Treasurer of United Food and Commercial Workers, Local Union 23; John Doe and Richard Doe as Officers, Agents, and Members of United Food and Commercial Workers, Local Union 23.

OPINIONS BELOW

The order, and accompanying decision, of the Supreme Court of Appeals of West Virginia, are set forth, respectively, at Appendix A and Appendix B, pp. A-1 to B-24, below.

JURISDICTION

The final judgment of the of the Supreme Court of Appeals of West Virginia was entered on April 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

The relevant statute is the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. 151 *et seq.*, including Section 7 of the Act, which provides in part that "[e]mployees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities..." 29 U.S.C. § 157; and Section 8(a)(1) of the Act, which provides that "[i]t shall be an unfair labor practice for an employer...to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." 29 U.S.C. § 158(a)(1).

STATEMENT

This case concerns the conflict that often arises between the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, which protects the right of labor organizations to engage in picketing and handbilling activity, and the enforcement of state trespass laws when such union activity takes place on private property. Under what circumstances the Act preempts state court jurisdiction over trespass actions against union picketing was addressed by the Court in *Sears, Roebuck and Co. v. San*

Diego County District Council of Carpenters, 436 U.S. 180 (1978). At issue in this case is trespassory union picketing and handbilling, which the employer and property owner sought to remove to public property through a trespass action in state court, and which the union sought to protect by the filing of an unfair labor practice charge with the General Counsel of the National Labor Relations Board ("NLRB" or the "Board"). Whether the initial invocation of the Board's jurisdiction by filing a charge preempts a state trespass action in these circumstances was unresolved by the Court in *Sears*, which has led to conflicting state court decisions and has left employers and labor unions with great uncertainty.

Riesbeck Food Markets, Inc. (Riesbeck's) operates retail food supermarkets, including the store located in a shopping mall that it leases from Elm Grove Properties in Wheeling, West Virginia. United Food and Commercial Workers, Local Union 23, an unincorporated labor association, has never represented Riesbeck's employees.

On September 7, 1988, respondents began picketing and handbilling activities on petitioners' private property immediately outside the customer entrances to the Riesbeck's supermarket. The picketing and handbilling activities were not connected with any labor dispute between Riesbeck's and its employees. The purpose of the union's picketing and handbilling was stated in its correspondence of the same date to Riesbeck's, the pertinent portions of which state as follows:

> The sole purpose of the picketing and handbilling will be to truthfully advise the public, including customers, that Riesbeck's does not employ members of, nor have a contract with, the UFCW Local 23 . . . . You are further advised that UFCW, Local 23 disclaims any interest in representing employees of this store. Specifically, the picketing is not intended to force or require you to recognize or bargain with UFCW, Local 23, nor to force or require any employee of this store to accept or select UFCW, Local 23 as their collective bargaining representative. UFCW, Local 23 does not

claim to represent a majority of the employees of this store.

The picketing and handbilling activity, which specifically requested customers to not patronize Riesbeck's store, was conducted by individuals hired by the union to carry pickets and distribute handbills. None of the picketing and handbilling was ever performed by Riesbeck's employees, or even by members of the union employed by Riesbeck's unionized competitors. Respondents did not request permission from petitioners to picket and handbill on their private property before commencing picketing and handbilling activity immediately outside the customer entrances to Riesbeck's supermarket. After the picketing and handbilling began, Riesbeck's store manager asked the union agents to relocate their activity to the public property immediately adjacent to the street entrances to the shopping center. The pickets refused to move.

Petitioners then filed a complaint in the Circuit Court of Ohio County, West Virginia on September 9, 1988, alleging that respondents' refusal to cease picketing and handbilling activity immediately outside the customer entrances to Riesbeck's supermarket constituted illegal trespassing on petitioners' premises. Petitioners also moved for injunctive relief against trespassing by respondents on petitioners' premises, and on the same date the Circuit Court issued a temporary restraining order granting the relief sought by petitioners. (*See* Appendix E).

On October 14, 1988, at an evidentiary hearing on petitioners' request for permanent injunctive relief, respondents filed a motion to dismiss the action on the basis that, *inter alia*, the jurisdiction of the Circuit Court had been preempted by respondents' filing of a charge against Riesbeck's with the National Labor Relations Board on September 19, 1988. On November 9, 1988, the Circuit Court issued a decision in letter form ruling that petitioners were entitled to a permanent injunction against trespassing by respondents on petitioners' premises, and rejected the preemption argument made by respondents in their motion to dismiss. It permitted the union

activity to continue, but limited its location to the public property immediately adjacent to the street entrance to respondents' private property. In its permanent injunction order issued on December 19, 1988 (*See* Appendix D), the Circuit Court stated its conclusions of law in pertinent part as follows:

> 1. The jurisdiction of this Court to address the issue of trespassing by Defendants is not preempted by federal labor law.
> 2. Defendants have no legally protected right to trespass on Plaintiffs' property against Plaintiffs' wishes.

On October 4, 1989, after investigating the union's charge for more than one year, the Acting General Counsel of the National Labor Relations Board issued a Complaint against petitioner Riesbeck's. The Complaint alleges that Riesbeck's refusal to grant respondents access to petitioners' private property is an unfair labor practice, and that Riesbeck's maintenance of the trespass action in state court also constitutes an unfair labor practice.[2]

Respondents were granted their petition for appeal of the Circuit Court's decision by the Supreme Court of Appeals of West Virginia. (*See* Appendix C). That court, on April 3, 1991, entered an order reversing the judgment of the Circuit Court to the extent that it enjoined the Union from picketing or handbilling on the shopping center property. (*See* Appendix A). In an accompanying split decision based upon sharply differing interpretations of this Court's ruling in *Sears*, the court held that trespassory union picketing and handbilling could not be enjoined by the state trial court because it was obligated to defer to the jurisdiction of the NLRB once the

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[2] The complaint was heard by an NLRB Administrative Law Judge, who issued a recommended decision and order on January 28, 1991. Exceptions to the recommended decision have been filed by the parties with the Board. As of the date of this petition, approximately 34 months after the union's charge was filed, the NLRB has not issued a final decision.

Union filed an unfair labor practice charge against Riesbeck's. (*See* Appendix B)

The West Virginia Supreme Court of Appeals acknowledged that this Court, in *Sears*, found that although the union's trespassory picketing was arguably protected under the National Labor Relations Act, federal law did not preempt the state court trespass action because the employer had been left with no forum for an orderly resolution of the issue except in state court. (Pp. B-12,13, below.) The court also conceded that *Sears* "did not specifically decide" whether, as in this case, the result would be different if the union filed an unfair labor practice charge with the General Counsel of the NLRB. It nonetheless based its ruling on what it found in *Sears* to be a "definite suggestion that the state court's jurisdiction would be preempted in such circumstances. . ." (P. B-13, below.)

Justice Neely issued a strong dissent. Taking account of the fact that the employer is precluded under the terms of the Act from invoking the jurisdiction of the NLRB, and that its property rights could not be vindicated in that federal forum until the union decides to invokes NLRB jurisdiction and the Board much later issues a final decision, Justice Neely stated that the critical question left unresolved in *Sears* is what happens in this "jurisdictional no-man's land" between the onset of trespassory union activity and the Board's final decision. (P. B-19, below.) After noting the violence inherent in sustained trespassory picketing, as well as the finding by this Court in *Sears* that permitting state court jurisdiction involves no significant risk of prohibiting conduct protected by the Act when that conduct takes place on private property, he concluded that "the arguably protected character of the Union's picketing of Riesbeck does not deprive this State's circuit court of jurisdiction in the first instance." (P. B-23, below.)

REASONS FOR GRANTING THE WRIT

Resolving the conflict between the National Labor Relations Act and the protection of private property rights through the application of state law is of great importance in national labor law. The Court so recognized by granting certiorari in *Lechmere, Inc. v. NLRB*, 914 F.2d 313 (1st Cir. 1990), *cert. granted*, No. 90-970, 111 S.Ct. 1305 (1991), which has been set for argument at the 1991 Term.

This case, together with *Lechmere*, represents the *dual* legal issues faced by employers and labor organizations when union picketing and handbilling activity takes place on private property. Employers, who have no forum available at the NLRB and whose property interests are protected in the first instance by state trespass laws, seek vindication of their rights through the only forum available to them in state courts. Unions, whose interests are protected by the National Labor Relations Act, typically seek vindication of their rights by invoking the jurisdiction of the National Labor Relations Board.

The role of the NLRB, as required by the rulings of this Court in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and its progeny,[3] is to balance the rights of unions under Section 7 of the Act against the employer's property rights, taking into account the alternative means available to the union to communicate its message to its intended audience. The Board's current test for applying *Babcock & Wilcox* is set forth in *Jean Country*, 291 NLRB No. 4 (1988). In *Lechmere*, this Court is asked to decide whether the NLRB's *Jean Country* test impermissibly interprets *Babcock & Wilcox* by giving insufficient weight to employer property interests and fails to recognize the alternative means of communication available to the union.

The state courts, as in the instant case, typically are asked by the union engaged in trespassory picketing and handbilling

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[3] *See, e.g., Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), and *Hudgens v. NLRB*, 424 U.S. 507 (1976).

activity to dismiss trespass actions and requests for injunctive relief by employers on the grounds that those actions are pre-empted by the National Labor Relations Act. Thus, the state courts in these circumstances must initially decide whether they have jurisdiction as a matter of federal law. How a state court will decide the critical preemption question inevitably turns upon its construction of the Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959),[4] and, most significantly, the Court's decision in *Sears*, which applied the *Garmon* preemption formulation in the context of an employer's state court trespass action against a union's "area standards" picketing, where the union had not invoked NLRB jurisdiction by filing unfair labor practice charges. Because the *Sears* majority did not clearly decide whether the filing of a charge would have served to preempt state court jurisdiction over the employer's trespass action, state courts have reached conflicting conclusions when they have applied it to the issue presented in the instant case.[5]

The uncertainty of state courts, employers and labor unions as to the question presented in this case stems from two contradictory concurrences in *Sears*. Both concurrences discussed the jurisdictional "no-man's land" left unresolved in *Sears*: The only possible forum immediately available to the employer facing trespassory union activity is a state court; however, if the employer attempts to invoke the state court's jurisdiction, the union typically responds by filing a charge with the General Counsel of the NLRB and then files a motion to dismiss the

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[4] In *Garmon, the Court* established that state courts may retain jurisdiction "where the activity regulated was a merely peripheral concern of the . . . Act" or "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act." 359 U.S. at 243-44 (footnote omitted).

[5] *See, e.g., Shirley v. Retail Store Employees Union*, 225 Kan. 470, 592 P.2d 433 (1979); *Weis Mkts, Inc. v. United Food & Commercial Workers Union, Local 400*, 85 Md. App. 284, 583 A.2d 1092 (1991).

state court action on preemption grounds. If the court grants the union's motion, there is simply no immediate forum, state or federal, available to the employer to vindicate its property rights.

In Justice Blackmun's separate concurrence, he expressed the view that once the union files an unfair labor practice charge against the employer's attempts to remove the union pickets,

> . . . state-court jurisdiction is pre-empted until such time as the General Counsel declines to issue a complaint or the Board . . . rules against the union and holds the picketing to be unprotected. Similarly, if a union timely files a § 8(a)(1) charge, a state court would be bound to stay any pending injunctive or damages suit brought by the employer until the Board has concluded, or the General Counsel by refusal to issue a complaint has indicated, that the picketing is not protected by § 7.

Sears, 436 U.S. at 209

Justice Powell responded to Justice Blackmun in a separate concurring opinion:

> Mr. Justice Blackmun, relying on the amicus brief of the National Labor Relations Board (Board), observes that "there is a practicable means of getting the issue of trespassory picketing before the Board in a timely fashion without danger of violence," ante, at 209, if the union-having been requested to leave the property-files at §8(a)(1) charge.
>
> *With all respect, this optimistic view overlooks the realities of the situation.* Trespass upon private property by pickets, to a greater degree than isolated trespass, is usually organized, sustained, and sometimes obstructive - without initial violence - of the target business and annoying to members of the public who wish to patronize that business. The "danger of violence" is

inherent in many - though certainly not all - situations of sustained trespassory picketing. One cannot predict whether or when it may occur, or its degree. It is because of these factors that, absent the availability of an equivalent remedy under the National Labor Relations Act, a state court should have the authority to protect the public and private interests by granting preliminary relief.

In the context of trespassory picketing not otherwise violative of the Act, the Board has no comparable authority. *If a §8(a)(1) charge is filed, nothing is likely to happen "in a timely fashion."* The Board cannot issue, or obtain from the federal courts, a restraining order directed at the picketing. And it may take weeks for the General Counsel to decide whether to issue a complaint. Meanwhile, *the "no-man's land" prevents all recourse to the courts, and is an open invitation to self-help.* I am unwilling to believe that Congress intended, by its silence in the Act, to create a situation where there is *no forum to which the parties may turn for orderly interim relief in the face of a potentially explosive situation.*•

•It is true that under this Court's decisions, state courts are not precluded from providing relief against actual or threatened violence. But in light of the "danger of violence" inherent in many instances of sustained trespassory picketing, relief often many come too late to prevent interference with the operation of the target business Cf. *People v. Bush*, 39 N.Y.2d 529, 384 N.Y.S.2d 733, 349 N.E.2d 832 (1976). Moreover, as Mr. Justice Clark noted for the Court in *Linn v. United Plant Guard Workers*, 383 U.S. 53, 64 n. 6, 86 S.Ct. 657, 664, 15 L.Ed. 2d 582 (1966), "[t]he fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect

> for the law and encourages the victim to take matters into his own hands." The "imminent threat of violence [that] exists whenever an employer is required to resort to self-help in order to vindicate his property rights," has prompted at least one state court to retain jurisdiction to enjoin trespassory picketing even after the filing of an unfair labor practice charge with the Board. *May Dept. Stores v. Teamsters*, 64 Ill.2d 153, 162-163, 355 N.E.2d 7, 10-11 (1976).

Justice Powell concluded that:

> I do not agree with Mr. Justice Blackmun that "the logical corollary of the Court's reasoning" in its opinion today is that state-court jurisdiction is pre-empted forthwith upon the filing of a charge by the union. I would not join the Court's opinion, if I thought it fairly could be read to that effect.

436 U.S., at 213-214 (emphasis added).

In the *May Department Stores* case cited by Justice Powell, the Illinois Supreme Court ruled that the filing of NLRB unfair labor practice charges did not preempt a state court from jurisdiction to consider an employer's request for an injunction against trespassing. The court concluded that the application of the Illinois law of trespass fell within both the "merely peripheral" and the "local feeling and responsibility" exceptions to the preemption doctrine.

The Illinois court noted that an imminent threat of violence exists whenever an employer is required to resort to self-help to vindicate his property rights, and went on to say the "[t]he fact that a charge is on file does not remove the compelling interests which justify the existence of State jurisdiction. The imminent threat of violence occasioned by an unauthorized trespass is not rendered less immediate by simply filing an unfair labor practice charge, nor is the State's interest in preventing violence any less significant." 355 N.E. 2d at 11.

The court went on to explain that the injunctive relief granted by the trial court "merely had the effect of maintaining the status quo during the pendency of the NLRB proceedings. No prejudice to the union could result from this pattern since the injunction would have been vacated immediately upon an NLRB finding in favor of the Union. In the highly unlikely event that the circuit court would refuse to vacate the injunction in these circumstances, the NLRB could provide relief by seeking to enjoin the order of the State Court." 355 N.E., at 12.

The chronology of the instant case establishes that Justice Blackmun's observation that "there is a practicable means of getting the issue of trespassory picketing before the Board in a timely fashion," while theoretically correct, ignores the realities of NLRB proceedings. Even Justice Powell's prediction that "it may take weeks for the General Counsel to decide whether to issue a complaint" was nearly as unrealistic in this case. The union filed its unfair labor practice charge in September, 1988, and the NLRB General Counsel did not complete its initial investigation until October, 1989, over one year later. Moreover, there is no indication as to when a final order of the NLRB will issue on the question whether respondents are privileged to trespass on petitioner's property; as of the date of this petition, approximately 34 months have passed since the charge was filed. Thus, Justice Powell's expressed concern about the creation of a "no man's land" in which an employer would have neither a state nor a federal forum to which to turn for interim relief from trespassory activity is borne out by this case.

This case, and *Lechmere* present the two key legal issues raised by union picketing and handbilling on an employer's private property. In *Lechmere*, the Court will decide the appropriate balance between state law property rights and the Act's Section 7 rights. The Court should hear this case to decide the appropriate relationship between state courts and the NLRB in the face of union picketing and handbilling activity on employer's private property.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and this case and *Lechmere*, No. 90-970, should be set for argument consecutively.

Respectfully submitted,

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July 2, 1991

APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 3rd day of April, 1991, the following order was made and entered:

Riesbeck Food Markets, Inc., and
Elm Grove Properties, Plaintiffs
Below, Appellees

vs.) No. 19485

United Food and Commercial Workers,
Local Union 23, Carl Huber,
as President of United Food and
Commercial Workers, Local Union 23,
James Bono, as Secretary-Treasurer
of United Food and Commercial
Workers, Local Union 23, John Doe
and Richard Doe as Officers, Agents,
and Members of United Food and Commercial
Workers, Local Union 23, Defendants
Below, Appellants

The Court, having maturely considered the transcript of the record and the oral argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in the judgment of the Circuit Court of Ohio County, rendered on the 19th day of December, 1988. It is therefore considered and ordered by the Court that said judgment be, and the same is hereby, set aside, reversed and annulled insofar as it enjoined the Union from peaceful picketing and/or handbilling on shopping center property, and that the appellants, United Food and Commercial Workers, Local Union 23, Carl Huber, as President of United

Food and Commercial Workers, Local Union 23, James Bono, as Secretary-Treasurer of United Food and Commercial Workers, Local Union 23, John Doe and Richard Doe as Officers, Agents, and Members of United Food and Commercial Workers, Local Union 23, do recover of and from the appellees, Riesbeck Food Markets, Inc., and Elm Grove Properties, their costs about the prosecution of their appeal in this Court in this behalf expended; all of which is ordered to be certified to the Circuit Court of Ohio County.

The syllabus of points adjudicated, prefixed to the written opinion aforesaid, prepared by Chief Justice Miller, was concurred in by Justices McHugh, Workman and Brotherton. Justice Neely dissents.

A True Copy

/s/ Ancil G. Ramey

Attest:_____

Clerk, Supreme Court
of Appeals

APPENDIX B

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 1991 Term

NO. 19485

RIESBECK FOOD MARKETS, INC.,
AND ELM GROVE PROPERTIES
Plaintiffs below, Appellees,

V.

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL UNION 23; CARL HUBER, AS PRESIDENT
OF UNITED FOOD AND COMMERCIAL WORKERS, LOCAL
UNION 23; JAMES BONO, AS SECRETARY-TREASURER
OF UNITED FOOD AND COMMERCIAL WORKERS, LOCAL
UNION 23; JOHN DOE AND RICHARD DOE
AS OFFICERS, AGENTS, AND MEMBERS OF UNITED
FOOD AND COMMERCIAL WORKERS, LOCAL UNION 23
Defendants Below, Appellants

Appeal from the Circuit Court of Ohio County
Honorable George L. Spillers, Judge
Civil Action No. 88-C-605

Reversed

Submitted: January 8, 1991
Filed: April 3, 1991

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CHIEF JUSTICE MILLER delivered the Opinion of the Court.

JUSTICE NEELY dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. Peaceful informational picketing by a union may be arguably protected by Section 7 of the National Labor Relations Act, even though it occurs on private property, if the union files an unfair labor practice charge against the parties seeking to prevent such activity. The National Labor Relations Board has primary jurisdiction of such disputes, and a state court should defer to that jurisdiction once the union files the unfair labor practice charge.

2. A state court may enjoin pickets from engaging in obstructive, disruptive, or intimidating behavior. Such conduct is not protected under the National Labor Relations Act and is clearly subject to state court control in the first instance, even though the National Labor Relations Board is considering an unfair labor practice charge filed by a union arising out of the same incident.

Miller, Chief Justice:

In this appeal from a final order of the Circuit Court of Ohio County dated December 19, 1988, we are asked to determine whether the circuit court was correct in restricting informational picketing on private property. We conclude that jurisdiction of the case was preempted by federal law, and we reverse the judgment of the circuit court.

Riesbeck Food Markets, Inc. (Riesbeck) is an Ohio corporation which operates a supermarket in the Elm Grove Crossing shopping center in Wheeling. Riesbeck leases the premises from Elm Grove Properties (Elm Grove), a general partnership which owns the shopping center. United Food and Commercial Workers, Local Union 23 (Union), is an unincorporated labor association with offices in Pittsburgh, Pennsylvania, which represents employees of other retail grocery stores in northern West Virginia.

On September 7, 1988, the Union established an informational picket line outside the customer entrances to the Riesbeck Store. The pickets carried placards which identified Riesbeck as a nonunion employer and asked the public not to

patronize the market.[1] In addition, the pickets passed out handbills which elaborated on the nonunion theme and urged customers to shop only at Union stores.[2] The store manager asked the pickets to leave the premises, but they refused. The Union apparently made no attempt to organize Riesbeck employees, and none of the pickets were employed by Riesbeck.

On September 9, 1988, Riesbeck and Elm Grove filed a complaint in the Circuit Court of Ohio county seeking to enjoin the Union from picketing and handbilling upon their private property. The circuit court issued a temporary

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[1] The complete text of the sign was:

"INFORMATIONAL PICKET LINE
RIESBECKS
THIS IS TO INFORM
THE PUBLIC THAT THIS
EMPLOYER DOES NOT EMPLOY
MEMBERS OF, OR HAVE A
CONTRACT WITH UFCW LOCAL 23, AFL-CIO-CLC!
PLEASE DO NOT PATRONIZE!"

[2] The handbill stated:

"PLEASE DO NOT SHOP AT THIS STORE

"1. THIS EMPLOYER IS A NON-UNION EMPLOYER AND DOES NOT HAVE A CONTRACT WITH, OR EMPLOY MEMBERS OF, U.F.C.W., LOCAL 23, WHICH REPRESENTS OTHER GROCERY STORE EMPLOYEES IN THIS AREA.

"2. UNFAIR, NON-UNION AND FOREIGN COMPETITION HAS DESTROYED SEVERAL PITTSBURGH AREA INDUSTRIES, INCLUDING COAL AND STEEL. PLEASE HELP US PROTECT OUR MEMBERS FROM THE SAME FATE BY SHOPPING ONLY AT U.F.C.W., LOCAL 23 STORES.

"3. SUPPORT YOUR UNION BROTHERS AND SISTERS. SHOP ONLY WHERE YOU SEE THE UNION LABEL ON THE GROCERY STORE DOOR. . . ."

restraining order, effectively forcing the Union to move its activities to the public areas at the entrances to the shopping center.[3] Hearings on the issuance of a permanent injunction were set for October 14, 1988, and November 8, 1988.

On September 19, 1988, the Union filed an unfair labor practice charge against Riesbeck with the National Labor Relations Board (NLRB). The Union asserted that Riesbeck's attempts to remove the pickets from the shopping center premises interfered with the rights of employees secured by the National Labor Relations Act (the Act), 29 U.S.C. §§ 151-168 (1988). The NLRB Regional director subsequently issued a complaint which referred the matter to an administrative law judge for hearing.[4] At the permanent injunction hearings before the circuit court, the Union argued that the NLRB had exclusive jurisdiction of the case.

By order dated December 19, 1988, the circuit court issued a permanent injunction against the Union. The court rules that the matters at issue in the state court proceedings were not preempted by federal labor law and ordered picketing and handbilling removed to the public areas at the shopping center entrances.

On appeal, the Union's principal contention is that the circuit court's jurisdiction over the case was preempted by provisions of the Act. The Union contends that its peaceful informational picketing of the Riesbeck store was protected by Section 7 of the Act, 29 U.S.C. § 157, which enumerates the

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[3] The order also restricted the number of pickets at each entrance and prohibited obstructive, disruptive, and intimidating behavior on the part of the pickets.

[4] The parties have stipulated that the NLRB investigated the unfair labor practice charge until October 4, 1989, when the Regional Director issued the complaint against Riesbeck.

rights of employees.[5] In addition, the Union asserts that Riesbeck's demand that the pickets leave the shopping center premises constituted an interference with their Section 7 rights, an unfair labor practice under Section 8 of the Act, 29 U.S.C. § 158.[6]

The general rule is that state courts must defer to the primary and exclusive jurisdiction of the NLRB to determine all controversies arising out of activities protected by Section 7 or prohibited by Section 8 of the Act. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959); *United Maintenance & Mfg. Co. v. United Steelworkers*, 157 W. Va. 788, 204 S.E. 2d 76 (1974); *McJunkin Corp. v. Bell Lines*, Inc., 144 W. Va. 330, 108 S.E. 2d 12 (1959). *See generally* 48A Am. Jur. 2d *Labor & Labor Relations* § 2003 (1979); 51A C.J.S. *Labor Relations* §§ 524, 525 (1967); Annot., 75 L. Ed. 2d 988 (1985); Annot., 38 L. Ed. 2d 796 (1974). The reason for this exclusivity is to ensure a uniform national labor policy by avoiding the conflicting or incompatible adjudications that would inevitably result from "[a] multiplicity of tribunals and a diversity of procedures." *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485, 490-91, 98 L. Ed. 228, 239-40, 74 S. Ct. 161, 166 (1953).

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[5] 29 U.S.C. § 157 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

[6] Section 8 of the Act lists those activities which constitute unfair labor practices. 29 U.S.C. § 158(a) provides, in pertinent part:

"It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]"

See also International Longshoremen's Ass'n v. Davis, 476 U.S. 380, 90 L. Ed. 2d 389, 106 S. Ct. 1904 (1986); *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 59 L.Ed. 2d 553, 99 S. Ct. 1328 (1979); *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 29 L. Ed. 2d 473, 91 S. Ct. 1909 (1971).

Guidelines for determining whether labor activity is governed by the Act were set out in *San Diego Building Trades Council v. Garmon, supra*. In *Garmon*, nonemployee union members picketed the employer's place of business, allegedly in an effort to compel the employer to execute a contract to hire only union members. The employer[7] filed an unfair labor practice charge with the NLRB and instituted an action for an injunction in state court. The union contested the state court's power to issue an injunction.

The Court in *Garmon* held that where activities are *clearly* governed by the Act, the NLRB has primary jurisdiction of the case, and state court jurisdiction is preempted.[8] The Court also

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[7] One need not have an employer-employee relationship with workers who engage in allegedly protected or prohibited activity to be considered an employer under the Act. *See* 29 U.S.C. §§ 152(2); 152(3). Thus, an unfair labor practice charge may be brought against a property owner even though it employs none of the workers involved in the activities giving rise to such charge. *See Sears, Roebuck, & Co. v. san Diego County Dist. Council of Carpenters*, 436 U.S. 180, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978); *Hudgens v. NLRB*, 424 U.S. 507, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976); *Seattle-First Nat'l Bank v. NLRB*, 651 F. 2d 1272 (9th Cir. 1980).

[8] The *Garmon* court expressed this concept as follows:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the states free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." 359 U.S. at 244, 3 L. Ed. 2d at 782, 79 S. Ct. at 779.

noted, however, that it is not always clear whether a particular activity is protected by Section 7 or prohibited by Section 8 of the Act. State courts are entitled to retain jurisdiction "where the activity regulated was a merely peripheral concern of the . . . Act" or "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act."[9] 359 U.S. at 243-44, 3 L. Ed. 2d at 782, 79 S. Ct. at 779. (Footnote omitted). Noting that "courts are not primary tribunals to adjudicate such issues," the supreme Court concluded: "[W]hen an activity is *arguably* subject to § 7 or § 8 of the act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 244, 245, 3 L. Ed. 2d at 783, 79 S. Ct. at &79, 780. (Emphasis added). *See United Maintenance & Mfg. Co. v. United Steelworkers, supra; McJunkin Corp. v. Bell Lines, Inc., supra. See generally* 51A C.J.S. *Labor Relations* § 525.

It is undisputed that peaceful informational picketing of the type involved here is a protected activity under Section 7 of the act. *See Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 455 L. Ed. 2d 209, 98 S. Ct. 1745 (1978); *International Longshoremen's local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 25 L.Ed. 2d 218, 90 S. Ct.

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[9] In *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 436 U.S. at 195, 56 L. Ed. 2d at 224, 98 S. Ct. at 1756, the Court listed specific instances of conduct which has been held subject to state court jurisdiction:

> "*See Construction Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 [98 L. Ed. 1025, 74 S. Ct. 833 (1954)] (threats of violence); *Youndahl v. Rainfair*, Inc., 355 U.S. 131, [2 L. Ed. 2d 151, 78 S. Ct. 206 (1957)] (violence); *Automobile Workers v. Russell*, 356 U.S. 634 [2 L. Ed. 2d 1030, 78 S. Ct. 932 (1958)] (violence); *Linn v. Plant Guard Workers*, 383 U.S. 53 [51 L. Ed. 2d 338, 97 S. Ct. 1056 (1977)] (intentional infliction of mental distress)."

872 (1970); *Giant Food Mkts. v. NLRB*, 633 F.2d 18 (6th Cir. 1980). The same rule has been applied to union handbilling. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 57 L. Ed. 2d 428, 98 S. Ct. 2505 (1978); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 89 L. Ed. 1372, 65 S. Ct. 982 (1945); *Sentry Mkts., Inc. v. NLRB*, 914 F.2d 113 (7th Cir. 1990).

It has also been recognized that in certain circumstances a trespass upon the employer's private property may be protected. In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 100 L. Ed. 975, 76 S. Ct. 679 (1956), for example, employers refused to permit nonemployee union organizers to distribute union literature on company-owned parking lots. Unfair labor practice charges were filed against the employers, whom the NLRB found to have unlawfully denied the organizers access to their private property. On appeal, the Supreme Court upheld the NLRB, concluding that the employee's right to receive organizational material under Section 7 must be balanced against the employer's right to control the use of its property to reach an "[a]ccommodation between the two . . . with as little destruction of one as is consistent with the maintenance of the other."[10] 351 U.S. at 112, 100 L. Ed. at 982-83, 76 S. Ct. at 684. The Court rules that where there was no alternative means by which the union's message could be transmitted to its intended audience, the organizers' trespassory handbilling was a protected activity which superseded the

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[10] The Court in *Babcock* stated:

"Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees make ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." 351 U.S. at 112, 100 L. Ed. at 982-83, 76 S. Ct. at 684.

employers' private property rights. *See generally* 48 Am. Jr. 2d *Labor & Labor Relations* § 875 (1979).

In *Hudgens v. NLRB*, 424 U.S. 507, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976), the Supreme Court applied these principles to a strike in which warehouse employees peacefully picketed their employer's retail store at an enclosed shopping mall. After an agent of the mall owner threatened the pickets with arrest for trespassing if they did not leave the mall, the union filed an unfair labor practice charge against the mall owner. The Supreme Court concluded that the principles of accommodation enunciated in *Babcock* controlled,[11] but stated that "[t]he locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." 424 U.S. at 522, 47 L. Ed. 2d at 208-09, 96 S. Ct. at 1038. The Court went on to state that "[i]n each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance." 424 U.S. at 522, 47 L. Ed. 2d at 209, 96 S. Ct. at 1038.

The Union argues that the *Babcock* accommodation principles are applicable in this case[12] and that the circuit court

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[11] In *Hudgens*, the NLRB had originally ruled that the picketing was protected by the First Amendment. After reviewing several of its prior cases, *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 33 L. Ed. 2d 131, 92 S. Ct. 2219 (1972); *Amalgamated Food Employees Union, Local No. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 20 L. Ed. 2d 603, 88 S. Ct. 1601 (1968), the Court concluded that the owner of the shopping mall could restrict stranger access to his private property because the "constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." 424 U.S. at 513, 47 L. Ed. 2d at 202, 96 S. Ct. at 1033. The court concluded that the rights of the parties were to be determined solely under the Act and remanded the case to the NLRB for application of the *Babcock* accommodation principles.

[12] The record shows that the Riesbeck store is approximately 120 feet from the closest of the three shopping center entrances and not visible from the farthest one, about three-tenths (.3) of a mile away. The Union asserts

should have deferred to the jurisdiction of the NLRB. On the other hand, the plaintiffs below do not challenge the Union's right to picket and handbill, but only its right to conduct such activity on their private property. The plaintiffs assert that trespass is one of those activities so deeply rooted in local feeling and responsibility that it falls outside the ambit of the act and is a proper matter for adjudication by state courts.

In support of their position, the plaintiffs rely on *Sears, Roebuck, & Co. v. San Diego County District Council of Carpenters, supra*. In *Sears*, nonemployee union members set up a picket line on the property of a Sears department store to advise the public that the store had hired nonunion carpenters. A Sears employee asked the pickets to leave, but they refused. Sears instituted a trespass action in state court and subsequently obtained an injunction preventing the union from picketing on store property. The union asserted that the state courts had no jurisdiction to enjoin the picketing because it was arguably protected under the Act. Significantly, the union did not file an unfair labor practice charge with the NLRB.

The Supreme Court started with the proposition that the standards for judging whether the picketing was arguably protected or arguably prohibited are not to be applied in a rigid or inflexible manner.

> "While the *Garmon* formulation accurately reflects the basic federal concern with potential state interference with national labor policy, the history of the labor pre-emption doctrine in this court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected." 436 U.S. at 188, 56 L. Ed.

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that restricting its picketing and handbilling activity to these locations rendered ineffective its ability to communicate its message to its intended audience, i.e., Riesbeck's customers.

2d at 219-20, 98 S. Ct. at 1752-53. (Footnote omitted).

The Supreme Court recognized a two-pronged inquiry for application of the *Garmon* principles in circumstances where the activity is not clearly subject to the Act. The first inquiry is whether the activity is arguably prohibited under Section 8. In this situation, the existence of a "a significant state interest protecting the citizen from the challenged conduct" is important. 436 U.S. at 196, 56 L. Ed. 2d at 225, 98 S. Ct. at 1757. However, "[t]he critical inquiry . . . is . . . whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board." 436 U.S. at 197, 56 L. Ed. 2d at 225, 98 S. Ct. at 1757. The Court concluded in *Sears* that the issue which would have been presented to the NLRB was whether the picketing had been proscribed by Section 8. This was unrelated to the state claim of trespass, which challenged only the location of the picketing. Consequently, the issues being distinct, there was no realistic risk of interference with the NLRB's primary jurisdiction which would warrant preemption of state court jurisdiction over the trespass action.

With respect to the second prong of the inquiry, the Supreme Court was willing to concede that the union's trespassory picketing was arguably protected under Section 7 of the Act. The Court concluded, however, that this fact alone was not sufficient to warrant preemption of state court jurisdiction in all cases: "The primary-jurisdiction rationale justifies preemption only in situations in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so." 436 U.S. at 201, 56 L. Ed. 2d at 228, 98 S. Ct. at 1759. The Court held that the union's failure to file with the NLRB an unfair labor practice charge challenging Sears' demand that the pickets

leave its property[13] left the employer with no forum for an orderly resolution of the issue except in state court. 436 U.S. at 201-02, 56 L. Ed. 2d at 228-29, 98 S. Ct. at 1759-60. The Court concluded that the primary jurisdiction rationale was relatively unimportant when compared with the employer's interest in having an opportunity to litigate whether the picketing was, in fact, protected and held that preemption of the state court's jurisdiction was not warranted solely on the ground that the activity was arguably protected.

The majority in *Sears* did not specifically decide whether the state court's jurisdiction of the trespass claim would have been preempted if, as in the case before us, the union had filed an unfair labor practice charge with the NLRB.[14] The majority opinion, however, made a definite suggestion that the state court's jurisdiction would be preempted in such circumstances: "As long as the union has a fair opportunity to present the protection issue to the Labor Board, it retains meaningful protection against the risk of error in a state tribunal. In this case the Union failed to invoke the jurisdiction of the Labor Board[.]"[15] 436 U.S. at 207, 56 L. Ed. 2d at

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[13] In note 44, in part, of *Sears*, 436 U.S. at 207-08, 45 L. Ed. 2d at 232, 98 S. Ct. at 1763, the Supreme Court stressed that Sears' demand that the union cease the trespassory picketing was critical to its holding:

> "The fact that Sears demanded that the Union discontinue the trespass before it initiated the trespass action is critical to our holding. While it appears that such a demand was a precondition to commencing a trespass action under California law, see [*Sears*, 49 Cal. App. 3d 232] 122 Cal. Rptr. 449 (1975), in order to avoid a valid claim of pre-emption, it would have been required as a matter of federal law in any event."

[14] Nor does it appear that the Supreme Court has addressed the issued of nonemployee trespassory picketing or handbilling since *Sears*....

[15] This statement was reinforced in note 43 of *Sears*, 436 U.S. at 207, 56 L. Ed. 2d at 231, 98 S. Ct. at 1763:

> "Not only could the Union have filed an unfair labor practice charge pursuant to § 8(a)(1) of the Act at the time Sears

231, 98 S. Ct. at 1762. (Footnote omitted).

Other courts which have reached the issue have concluded that the filing of an unfair labor practice charge with the NLRB preempts state court jurisdiction to enjoin trespassory labor activity in the absence of other factors such as mass picking or violence. *See Shirley v. Retail Store Employees Union*, 225 Kan. 470, 592 P.2d 433 (1979) (trespassory employee picketing); *Cross Country Inn, Inc. v. South Cent. Dist. Council, United Bhd. of Carpenters & Joiners of Am.*, 50 Ohio App. 3d 8, 552 N.E. 2d 232 (1989) (trespassory nonemployee handbilling); *Wiggins & Co., Inc. v. Retail Clerks Union Local No. 1557*, 595 S.W. 2d 802 (Tenn. 1980) (trespassory nonemployee picketing). *Contra Weis Mkts. Inc. v. United Food & Commercial Workers Union*, Local 400, 85 Md. App. 284, 583 A. 2d 1092 (1991); *Smitty's Super Mkts., Inc. v. Retail Store Employees Local 322*, 637 S.W. 2d 148 (Mo. App. 1982). *See generally* Annot., 56 L. Ed. 2d 813 (1979). As the Supreme Court of Kansas stated in Syllabus Point 3 of *Shirley, supra*:

> "If a union, after receiving from the employer or property owner a notice to cease trespassory picketing, files a complaint with the NLRB and the board takes jurisdiction, a Kansas district court has the power to enjoin trespassory picketing only where there is shown to be actual violence or a threat of immediate violence or some obstruction to the free use of property by the public that immediately threatens public health or safety or that denies to an employer or his customers reasonably ingress or

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demanded that the pickets leave its property, but the Board's jurisdiction could have been invoked and the protection of its remedial powers obtained even after the litigation in the state court had commenced or the state injunction issued. See *Capital Service, Inc. v. NLRB*, 347 U.S. 501 [98 L.Ed. 887, 74 S.Ct. 699 (1954)]; *NLRB v. Nash-Finch Co.*, 404 U.S. 138 [30 L. Ed. 2d 328, 92 S. Ct. 373 (1971)]."

egress to and from the employer's place of business."

We must agree with this interpretation. There is certainly precedent for the conclusion that the labor activities the Union engaged in here were arguably protected under Section 7. In *Sears*, for example, the Court stated: "Since it cannot be said with certainty that, if the Union had filed an unfair labor practice charge against Sears, the Board would have fixed the locus of the accommodation at the unprotected end of the spectrum, it is indeed 'arguable' that the Union's peaceful picketing, though trespassory, was protected." 436 U.S. at 205, 56 L. Ed. 2d at 230, 98 S. ct. at 1761. *See also Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. 1201 (Sept. 27, 1988). *See generally* 51A C.J.S. *Labor Relations* § 527. Moreover, by issuing the complaint against Riesbeck, the NLRB has already exercised some degree of jurisdiction over the Union's claim.

Accordingly, we conclude that peaceful informational picketing by a union may be arguably protected by Section 7 of the Act, even though it occurs on private property, if the union files an unfair labor practice charge against the parties seeking to prevent such activity. The NLRB had primary jurisdiction of the dispute between Riesbeck and the Union, and the circuit court should have deferred to such jurisdiction once the Union filed the unfair labor practice charge.

Elm Grove asserts that our conclusions with respect to Riesbeck should not prevent the circuit court from issuing an injunction on its behalf. Elm Grove notes that the unfair labor practice charge did not name it as a party and argues that under the decision in *Sears*, the Union cannot challenge Elm Grove's right to an injunction in state court.

We believe Elm Grove misreads the *Sears* opinion. To avoid even a potential conflict between state courts and the NLRB, the primary jurisdiction rationale provides, in effect, for a presumption in favor of preemption when the conduct in question is arguably protected under the Act. *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 82 L. Ed. 2d 373, 104 S. Ct. 3179 (4984). *See*

Belknap, Inc. v. Hale, 463 U.S. 491, 77 L. Ed. 2d 798, 103 S. Ct. 3172 (1983). In *Sears*, the Supreme Court simply refused to give the union the benefit of this presumption where it has deprived the employer of the opportunity to litigate the issue administratively by failing to file an unfair labor practice charge with the NLRB.

Unlike the property owner in *Sears*, Elm Grove was not necessarily excluded from litigating the protected character of the Union's activities before the NLRB. Under Section 10(b) of the act, 29 U.S.C. § 160(b), any person other than a party may intervene in an administrative proceeding involving an unfair labor practice charge at the discretion of the NLRB or of the hearing officer or agency.[16] *See J.P. Stevens Employees Educ. Comm. v. NLRB*, 582 F.2d 326 (4th Cir. 1978); *International Union, United Auto., Aerospace & Agric, Implement Workers*, 129 U.S. App. D.C. 196, 392 F.2d 801 (1967), *cert. denied*, 392 U.S. 906, 20 L. Ed. 2d 1364, 88 S. Ct. 2048 (1968). Because the complaint issued by the regional Director states that the Acting Counsel General is seeking to prevent Elm Grove from enforcing the circuit court's injunction, it seems apparent that a motion by Elm Grove to intervene in the proceedings would be granted. *See generally* 51A C.J.S. *Labor Relations* § 551. Consequently, the rationale underlying the Supreme Court's refusal to preempt state court jurisdiction in *Sears* is not present in this case.[17]

The Union also claims that Elm Grove never advanced this position below and, therefore, has waived it. More importantly, the Union points to the language in note 44 of

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[16] 29 U.S.C. § 160(b) provides, in pertinent part: "In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony."

[17] We decline to address the subsidiary issues raised by Elm Grove as to the possible scope of the Regional Director's inquiry and whether the NLRB's delay in reaching a decision justifies the state court in asserting jurisdiction.

Sears, 436 U.S. at 207-08, 56 L. Ed. 2d at 232, 98 S. Ct. at 1763, where the court stated that a demand to discontinue the trespass is necessary "in order to avoid a valid claim of pre-emption . . . as a matter of federal law[.][18] Elm Grove made no such demand of the Union.

Finally, we point out that our decision does not affect the circuit court's order insofar as it enjoined the pickets from engaging in obstructive, disruptive, or intimidating behavior. Such conduct is not protected under the Act and is clearly subject to state court control in the first instance, even though the NLRB is considering an unfair labor practice charge filed by a union arising out of the same incident. *See Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 2 L. Ed. 2d 151, 78 S. Ct. 206 (1957); *Rainbow Tours, Inc. v. Hawaii Joint Council of Teamsters*, 704 F.2d 1443 (9th Cir. 1983); *Kaplan's Fruit & Produce Co. v. Superior Court*, 26 Cal. 3d 60, 160 Cal. Rptr. 745, 603 P. 2d 1341 (1979); *PTA Sales, Inc. v. Retail Clerks Local No. 462*, 96 N.M. 581, 633 P.2d 689 (1981). *See also* 51A C.J.S. *Labor Relations* § 527.

For the reasons stated above, we conclude that the circuit court erred in issuing the injunction on behalf of Elm Grove and Riesbeck to the extent that it moved the location of the picketing. State court jurisdiction was preempted by the Union's filing of the unfair labor practice charge with the NLRB. Consequently, we reverse the judgment of the circuit court insofar as it enjoined the Union from peaceful picketing and/or handbilling on shopping center property.

Reversed.

No. 19485 - *Riesbeck Food Markets, Inc. and Elm Grove Properties v. United Food and Commercial Workers, Local Union 23, et al.*

Neely, Justice, dissenting:

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[18] As to the relevant text of note 44 of *Sears*, see note 13, *supra*.

The majority do not understand *Sears, Roebuck and Company v. San Diego District Council of Carpenters*, 436 U.S. 180 (1978), but in all truth, the judges who wrote *Sears* and related cases had no clear vision, and produced murky prose because no broad consensus could be reached.[1]

In the case at hand, Riesbeck is a non-union food store, and the Union is making no attempt to organize its workers. The Union, however, wishes to inform potential customers that Riesbeck does not pay union wages. The Union entered onto the common area of the shopping center in which Riesbeck is located and distributed handbills urging shoppers to limit their purchases to Union stores. The Union was not on Riesbeck's individual leasehold, but rather on the shopping center's common area.

Riesbeck and the shopping center landlord then went to state court to enjoin the Union from entering on their private property for the purpose of doing them injury, and the circuit court entered a preliminary injunction. Up to that point, no one had gone to the National Labor Relations Board. However, after the circuit court entered its preliminary injunction,

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[1] The majority opinion in *Sears* was far from unanimous. Although six justices joined in the result, Justice Blackmun filed a concurring opinion in which he differed with Justice Powell on the central question before us today, and Justice Brennan, joined by Justices Marshall and Stewart, filed a dissenting opinion.

We find the same lack of consensus in the case of *Hudgens v. NLRB*, 424 U.S. 507 (1976), a case that bears on the merits of the case before us, although the merits were not argued on appeal. In *Hudgens*, the Court overruled prior cases, and held that there was no First Amendment right to picket in a private shopping center, but that a determination of whether a union may picket in a private shopping center was to be made under the Labor Management Relations Act. Justice Stewart delivered the opinion of the Court. Justice Powell filed a concurring opinion, in which Chief Justice Berger joined. Justice White filed an opinion concurring in the result. Justice Marshall filed a dissenting opinion in which Justice Brennan joined, and Justice Stevens took no part in the consideration or decision of the case. This is the kind of clear, definite law that really helps lower courts and is like unto a full employment act for lawyers.

the Union filed an unfair labor practice charge with the NLRB. Therefore, the question in this case is not whether the jurisdiction of the NLRB would preempt state jurisdiction *should the NLRB choose to take jurisdiction*, but rather what happens in this dispute between the entry of the pickets onto the landlord's private property and the NLRB's final decision. Justices Blackmun and Powell, in their concurrences in *Sears* discussed the problem of a "jurisdictional no-man's land". Justice Powell addressed the "jurisdictional no-man's land" problem that exists *after* a matter like the one before us is presented to the NLRB:

> With all respect, this optimistic view overlooks the realities of the situation. Trespass upon private property by pickets, to a greater degree than isolated trespass, is usually organized, sustained, and sometimes obstructive -- without initial violence -- of the target business and annoying to members of the public who wish to patronize that business. The "danger of violence" is inherent in many -- though certainly not all -- situations of sustained trespassory picketing. One cannot predict whether or when it may occur, or its degree. It is because of these factors that, absent the availability of an equivalent remedy under the National Labor Relations Act, a state court should have the authority to protect the public and private interests by granting preliminary relief.
>
> In the context of trespassory picketing not otherwise violative of the Act, the Board has no comparable authority. If a § 8(a)(1) charge is filed, nothing is likely to happen "in a timely fashion." The Board cannot issue, or obtain from the federal courts, a restraining order directed at the picketing. And it may take weeks for the General Counsel to decide whether to issue a complaint. Meanwhile, the "no-man's land" prevents all recourse to the courts, and is an open invitation to self-help. I am unwilling to believe that Congress intended, by its silence in the

> Act, to create a situation where there is no forum to which the parties may turn for orderly interim relief in the face of a potentially explosive situation.
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> * * *
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> In sum, I do not agree with Mr. Justice Blackmun that "the logical corollary of the Court's reasoning" in its opinion today is that state-court jurisdiction is pre-empted forthwith upon the filing of a charge by the union. I would not join the Court's opinion if I thought it fairly could be read to that effect.

436 U.S. at 212-14 (Powell, J., concurring).[2] Justice Powell noted that under the Court decisions, state courts were not precluded from providing relief against actual or threatened violence, but that such relief may come too late, in light of the danger of violence inherent in sustained trespassory picketing.

There are, with regard to the jurisdictional no-man's land, a number of possibilities, of which today's majority has miraculously chosen the worst. The first possibility, of course, is for the employer to go out and hire some very large and very mean lads to persuade the picketers in the good old-fashioned way that they had made a mistake coming on private property. Justice Powell referred to this as "self-help", and labor lawyers sometimes refer to it as the "ungood" way of handling picketers. In fact, nine out of ten labor lawyers of my acquaintance advise their business clients that beating up picketers with baseball bats, particularly when the Union reciprocates by dynamiting the employer's premises, can create the mother of

---

[2] The section 8(a)(1) to which Justice Powell referred can be found at 29 U.S.C. §158. Old hands at labor law are apt to refer to labor law provisions by their location within the various labor Acts, rather than by their location in the United States Code. 29 U.S.C. § 141 indicates that the former National Labor Relations Act of 1935 and the later amendments should be referred to by the title of the Taft-Hartley amendments, that is -- the Labor Management Relations Act, 1947, yet many old hands still refer to the old National Labor Relations Act. In this opinion, I will give United States Code citations.

all labor disputes.

Now, assuming that the employer rejects the "ungood" way, what should it do? The majority implies -- but does not say -- that perhaps the employer should go to the notoriously glacial and incompetent NLRB and file an unfair labor practice charge. Unfortunately, (even forgetting the NLRB's limited sense of urgency) the Union has committed no unfair labor practice, anymore than the Union would have committed an unfair labor practice if every male member of the local had paraded naked around a convent shouting four letter expletives. The majority opinion in *Sears* unequivocally says at least that much.[3]

Indeed, one can read the LMRA with the attentiveness of a scholastic monk or the free-wheeling imagination of a deconstructionist yet find not one colorable ground for the employer's invocation of NLRB jurisdiction. This is so because the Union has not engaged in an unfair labor practice enumerated in 29 U.S.C. § 158(b)(1)-(7) (1990), [LMRA, § 8(b)(1)-(7)]. (1) The Union has not restrained its members or any other "employees" in the exercise of rights guaranteed in 29 U.S.C. § 157, nor has it coerced the employer in the selection of labor representatives or the adjustment of grievances. (2) The Union has not engaged in prohibited discrimination. (3) The Union has not refused to bargain collectively with the employer. (4) The Union has not engaged in a third party boycott. (5) The Union has not charged excessive membership dues. (6) The Union has not attempted to exact anything of value from the employer. (7) The Union has not engaged in improper recognitional picketing. However, there is at least

---

[3] The Court said, for instance:

> In this case, Sears could not directly obtain a Board ruling on the question whether the Union's trespass was federally protected. Such a Board determination could have been obtained only if the Union had filed an unfair labor practice charge alleging that Sears had interfered with the Union's § 7 right to engage in peaceful picketing on Sears' property.

436 U.S. at 201.

arguably a trespass to private property, and this issue must be decided by someone someplace or the "ungood" method of baseball bats and dynamite will take over, *faute de mieux*.

Therefore, unless the employer wishes to avail itself of a pleasure akin to listening to the sound of one hand clapping, it must either repair to the "ungood" method or solicit the intervention of the state court. At that point, the state court is under an obligation to decide whether the property rights of the employer and the shopping center owner are being violated. Nothing in the cases decided by the Supreme Court of the United States or the U.S. Court of Appeals for the Fourth Circuit indicates that the state court shouldn't make the call, including most notably *Sears, supra*, which actually indicates that the State court *should* make the call.

We know that if the employer selects the "ungood" method of ejecting the picketers, then the Union may go to the National Labor Relations Board. Logically, then, if the employer goes to state court for a chap in a black robe instead of going over to Steubenville for a chap with a baseball bat, the Union *still* ought to be able to go to the National Labor Relations Board. The big question is: Between the time the employer gets the injunction from the state court and the NLRB issues an order, can the Union continue to trespass and picket? Logically, the answer to that question is "no." And, nothing in *Sears* implies to the contrary.

The majority misreads the undeniably confusing *Sears* language. In *Sears*, Justice Stevens, writing for the majority, said:

> Nevertheless, several considerations persuade us that the mere fact that the Union's trespass was *arguably* protected is insufficient to deprive the state court of jurisdiction in this case.

436 U.S. at 200. The *Sears* situation was similar to the case before us. In the *Sears* cases, the Union picketed Sears in order to "secure work for union members and to publicize

Sears' undercutting of the prevailing area standards of the employment of carpenters." 436 U.S. at 184. Sears wanted the Union off its property. The Court said:

> Because the assertion of state jurisdiction in a case of this kind does not create a significant risk of prohibition of protected conduct, we are unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action.

Id. at 207. Likewise, I believe that the arguably protected character of the Union's picketing of Riesbeck does not deprive this State's circuit court of jurisdiction in the first instance.

The United States Court of Appeals for the Fourth Circuit (a court with at least a passing acquaintance with federal labor law) reads *Sears* the way I do. In the recent case of *Rum Creek Coal Sales v. Caperton*, No. 90-1439, to be reported at 926 F.2d 361, (February 25, 1991), the Fourth Circuit said:

> In *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978), the Court considered whether the NLRA deprived a "state court of the power to entertain an action by an employer to enforce state trespass laws against picketing which is arguably -- but not definitely -- prohibited or protected by federal law." Id. at 182, 98 S.Ct. at 1749. In an opinion by Justice Stevens, the Court concluded that, under the *Garmon* doctrine, neither the arguably protected character of the picketing, nor the arguable illegality of it, deprived the state courts of jurisdiction. *Id.* at 198, 207, 98 S.Ct. at 1758, 1762-63. The picketing at issue was peaceful, orderly, and nonobstructive.

Of course, should the NLRB conclude that the employer has committed an unfair labor practice by unreasonably restricting the right of the Union peacefully to picket and disseminate information, the NLRB can say so and then its decision preempts the state court injunction.[4] Furthermore, this allocation of authority between state and federal authorities gives the Union much opportunity to seek a favorable ruling on the merits without the baseball bats and the dynamite. Indeed, the Union gets two bites at the apple: (1) it can argue in state court that it has a federally-created right to picket on the public areas of shopping centers, and hope that the state judge (elected as he is by Union voters) agrees; and (2) the Union can file an unfair labor practice complaint with the NLRB. If the Union loses in front of the circuit judge, it should then cease picketing until such time as the NLRB renders a decision. If, then, the NLRB renders a decision that is at variance with the state court injunction, the state court injunction becomes a nullity and the Union may proceed to do whatever the NLRB says that it may do.

---

[4] Indeed, the NLRB has already decided a case factually *identical* to the case before us (only the names were different), and came out in favor of the Union. However, the U.S. Court of Appeals for the Sixth Circuit remanded the case on evidentiary grounds that make little sense unless one understands that the Sixth Circuit's natural disposition to Unions was substantially less favorable than the NLRB's in 1980. With the Party of Taft-Hartley firmly in power for sixteen out of the past twenty years, one might surmise that the position of the Sixth Circuit would not necessarily offend *today's* NLRB. *Giant Food Markets v. N.L.R.B.*, 633 F.2d 18 (6th Cir. 1980).

APPENDIX C

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th day of January, 1990, the following order was made and entered:

Riesbeck Food Markets, Inc. and Elm Grove Properties, Plaintiffs Below, Appellees

vs.) No. 19485

United Food and Commercial Workers, Local Union 23, Carl Huber, as President of United Food and Commercial Workers, Local Union 23, James Bono, as Secretary-Treasurer of United Food and Commercial Workers, Local Union 23, John Doe and Richard Doe as Officers, Agents, and Members of United Food and Commercial Workers, Local Union 23, Defendants Below, Appellants.

On a former day, to-wit, October 6, 1989, came the petitioners, United Food and Commercial Workers, Local Union 23, Carl Huber, as President of United Food and Commercial Workers, Local Union 23, James Bono, as Secretary-Treasurer of United Food and Commercial Workers, Local Union 23, John Doe and Richard Doe as Officers, Agents, and Members of United Food and Commercial Workers, Local Union 23, by Robinson & Dickinson and Daniel W. Dickinson, Jr., and James Reehl, their attorneys, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Ohio County, rendered on the 19th day of December, 1988, with the record therein accompanying the petition. Thereafter, on the 24th day of October, 1989, came the appellee, Elm Grove Properties, by Pauley, Curry, Sturgeon & Vanderford and James M. Sturgeon, Jr.; and Bricker & Eckler, J. Michael Kota, and

Don A. Zimmerman, its attorneys, and presented to the Court its response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition for appeal, but it is not to take effect until the petitioners or some person for them shall have given before the Clerk of the Circuit Court of Ohio County bond with good personal security in the penalty of FIFTY Dollars, conditioned according to law.

A True Copy

/s/ Ancil G. Ramey

Attest: _____

Clerk, Supreme Court of Appeals

APPENDIX D

IN THE CIRCUIT COURT OF OHIO COUNTY,
WEST VIRGINIA

RIESBECK FOOD MARKETS, INC., et al.,	:	
Plaintiffs,	:	88-C-605
vs.	:	
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL UNION 23, et al.,	:	
Defendants.	:	

ORDER

The Court ORDERS a permanent injunction based upon the following facts and conclusions.

Findings of Fact

1. Plaintiff Riesbeck Food Markets, Inc. (Riesbeck) is an Ohio corporation qualified to do business in West Virginia and having a place of business in the Elm Grove Crossing, 2485 National Road, Wheeling, West Virginia. Riesbeck operates a retail supermarket pursuant to a Lease with Plaintiff Elm Grove Properties. The premises leased by Riesbeck and as described in the Lease include a portion of the shopping center parking lot. The Lease also provides that Riesbeck has a right of use of the remaining common areas of the shopping center, and Riesbeck pays a fee for that right.

2. Plaintiff Elm Grove Properties, a General Partnership with its place of business at Three Elm Grove

Crossing, Wheeling, West Virginia, operates Elm Grove Crossing shopping center.

3. Defendant United Food and Commercial Workers Union Local Union No. 23 (UFCW Local 23) is a duly chartered Local Union of the United Food Commercial Workers with its office in Pittsburgh, Pennsylvania. UFCW Local 23 transacts business in this state.

4. Defendant Carl Huber is President of UFCW Local 23. He assists in the planning, supervision, execution, and review of all activities of UFCW Local 23.

5. Defendant James Bono is Secretary-Treasurer of UFCW Local 23.

6. Riesbeck's employees are not represented by any Union.

7. Defendants disclaim any interest in representing Riesbeck's employees.

8. Beginning on September 7, 1988, until restrained by this Court on September 9, 1988, Defendants placed three to five pickets on Plaintiffs' property immediately outside each entrance to Riesbeck's supermarket. The pickets carried signs that identify Riesbeck's as a non-union employer and request customers not to shop only at unionized supermarkets. The pickets also approached customers and handed them handbills with a similar message.

9. None of the pickets are or have been employed by Riesbeck's.

10. The pickets declined Plaintiffs' request that the pickets leave Plaintiffs' property.

11. By Order dated September 9, 1988, this Court moved the picketing from Plaintiffs' private property to adjacent public property at the street entrances to Plaintiffs' property. Defendants have continued their picketing from those locations since that date.

12. On September 19, 1988, Defendant UFCW Local 23 filed an unfair labor practice charge against Riesbeck's with the National Labor Relations Board alleging that their pickets' trespassing was privileged by Section 7 of the National Labor

Relations Act. The National Labor Relations Board has not taken final action on that charge as of this date.

Conclusions of Law

1. The jurisdiction of this Court to address the issue of trespassing by Defendants is not preempted by federal labor law. The non-employee informational pickets utilized by Defendants do not have a right protected by Section 7 of the National Labor Relations Act to enter Plaintiffs' property to carry on informational picketing, as Defendants can effectively communicate their informational message from adjacent public property. *Browning's Foodland*, 284 NLRB No. 104 (1987); *Smitty's Super Markets, Inc.*, 284 NLRB No. 128 (1987); *L&L Shop Rite, Inc.*, 285 NLRB No. 122 (1987).

2. Defendants have no legally protected right to trespass on Plaintiffs' property against Plaintiffs' wishes.

3. Plaintiffs have satisfied the prerequisites for injunctive relief.

Terms of the Injunction

The Defendants and each of them and all other persons associated with or acting in concert with any said Defendants, and all other persons to whom knowledge of this Order shall come are hereby permanently enjoined and restrained from:

1. Trespassing or picketing on Plaintiffs' property.

2. Directly or indirectly causing, permitting, instructing or stationing more than two (2) individuals at any one time, including shift change time for such individuals, to be on public property at or near any street entrance to Plaintiffs' premises. The location of such individuals on public property shall be in the areas designated on the map attached to this Order.

3. Interfering with, obstructing, or in any way hindering, stopping or delaying the ingress and egress of Plaintiffs' customers, employees, officers or agents and the members of the general public in their passage to and from Plaintiffs' premises through confrontation, threats, force, intimidation, coercion or other actions or attempting or conspiring to do same. This is not intended to prevent Defendants from engaging in peaceful picketing and handbilling

activities on public property in the numbers designated by this Court consistent with this Order.

4. Confronting, harassing, intimidating or coercing Plaintiffs' customers, employers, officers or agents by words or actions including but not necessarily limited to the use of profanity toward customers, employees, officers or agents.

It is further ORDERED that the Sheriff of Ohio County proceed forthwith to serve the Defendants, and those acting in concert with them, with notice of the terms of this Order.

To all of which action of the Court the Defendant through Counsel does object.

ENTER:

/s/ George L. Spillers

Judge

Dated this 19th day of December, 1988.

APPENDIX E

IN THE CIRCUIT COURT OF OHIO COUNTY,
WEST VIRGINIA

RIESBECK FOOD MARKETS, INC., et al.,	:	
Plaintiffs,	:	
vs.	:	Case No. 88-C-605
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL UNION 23, et al.,	:	
Defendants.	:	

TEMPORARY RESTRAINING ORDER

This cause came on for hearing upon Plaintiffs' verified Complaint and on the Motion of counsel for Plaintiffs for a Temporary Restraining Order, and it is hereby

ORDERED, ADJUDGED AND DECREED that:

The Defendants and each of them and all other persons associated with or acting in concert with any said Defendants, and all other persons to whom knowledge of this Order shall come are hereby enjoined and restrained from:

1. Trespassing or picketing on Plaintiffs' property.

2. Directly or indirectly causing, permitting, instructing or stationing more than four (4) stationary individuals at any one time, including shift change time for such individuals, to be on public property at or near any street entrance to Plaintiffs' premises. The location of such individuals on public property

shall be in the areas designated on the map attached to this Order.

3. Interfering with, obstructing, or in any way hindering, stopping or delaying the ingress and egress of Plaintiffs' customers, employees, officers or agents and the members of the general public in their passage to and from Plaintiffs' premises through confrontation, threats, force, intimidation, coercion or other actions or attempting or conspiring to do the same. This is not intended to prevent Defendants from engaging in peaceful picketing and handbilling activities on public property in the numbers designated by this Court consistent with this Order.

4. Confronting, harassing, intimidating or coercing Plaintiffs' customers, employers, officers or agents by words or actions including but not necessarily limited to the use of profanity toward customers, employees, officers or agents.

5. Approved bond in the amount of Five Hundred Dollars ($500.00) is filed with this Court.

It is further ORDERED that the Sheriff of Ohio County proceed forthwith to serve the Defendants, and those acting in concert with them, with its terms.

It is further ORDERED that the Sheriff of Ohio County proceed forthwith to serve the Defendants, and those acting in concert with them, with notice of the terms of this Order.

A hearing on Plaintiffs' Motion for Preliminary Injunction is set for September 23, 1988, at 11:15 A.M.

ENTER:

/s/ George L. Spillers

Judge

DATED: September 9, 1988

Supreme Court, U.S.
FILED
AUG 21 1991
OFFICE OF THE CLERK

(2)

No. 91-15

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

RIESBECK FOOD MARKETS, INC., *et al.*,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL 23, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

RESPONDENTS' MEMORANDUM IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a state court has jurisdiction to enjoin picketing by a labor union which is arguably protected by the National Labor Relations Act where the union has sought to invoke the jurisdiction of the National Labor Relations Board to determine whether the picketing is protected, and where the picketing is not "obstructive, disruptive, or intimidating"?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-15

RIESBECK FOOD MARKETS, INC., *et al.*,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 23, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

RESPONDENTS' MEMORANDUM IN OPPOSITION

The question presented in this case is whether the National Labor Relations Act, as amended, ("NLRA" or "the Act"), preempts the state courts' jurisdiction to enjoin peaceful, non-disruptive picketing by a labor union where (a) the union contends the picketing is protected by NLRA § 7, 29 U.S.C. § 157, and (b) the union files an unfair labor practice charge with the National Labor Relations Board ("NLRB" or "the Board") seeking to establish the protected nature of the picketing.

Petitioners contend that this question "was unresolved by th[is] Court" in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), that this supposed decisional void "has led to conflicting state court decisions" and that this supposed conflict "has left employers and labor unions with great uncertainty." Petition For a Writ of *Certiorari* ("Pet.") at 3. Not one of these assertions is correct.

1. In *Sears*, this Court considered the extent of the state courts' jurisdiction to enjoin picketing that is arguably protected by the NLRA in a case in which the union had *not* sought to invoke the NLRB's jurisdiction. The Court's reasons for holding that the state courts do have jurisdiction in that context leaves no doubt that federal law *is* paramount when the union *does seek to invoke the NLRB's jurisdiction.*

First, the *Sears* Court—after noting that the "primary jurisdiction" rationale of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and its progeny "militate in favor of pre-empting state-court jurisdiction over activity which is subject to the unfair labor practice jurisdiction of the federal Board", 436 U.S. at 199 n.29 —reasoned that because the union there had *not* filed an unfair labor practice charge, there was "in fact no risk of overlapping jurisdiction," *id.* at 201. The Court explained:

> The primary-jurisdiction rationale justifies preemption only in situations in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so. In this case, Sears could not directly obtain a Board ruling on the question whether the Union's trespass was federally protected. . . . By demanding that the Union remove its pickets from the store's property, Sears in fact pursued a course of action which gave the Union the opportunity to file such a charge. But the Union's response to Sears' demand foreclosed the possibility of having the ac-

commodation of § 7 and property rights made by the Labor Board.

* * * *

The primary-jurisdiction rationale unquestionably requires that where the same controversy may be presented to the state court or the NLRB, it must be presented to the Board. But that rationale does not extend to cases in which an employer has no acceptable method of invoking, or inducing the Union to invoke, the jurisdiction of the Board. [436 U.S. at 201-02; emphasis added.]

Second, the *Sears* Court stated that "[w]hile there does exist some risk that state courts will on occasion enjoin a trespass that the Board would have protected, the significance of this risk is minimized by the fact that in the cases in which the argument in favor of protection is the strongest, *the union is likely to invoke the Board's jurisdiction and thereby avoid the state forum.*" 436 U.S. at 206 (emphasis added). The Court elaborated:

> If there is a strong argument that the trespass is protected in a particular case, a union can be expected to respond to an employer demand to depart by filing an unfair labor practice charge; *the protection question would then be decided by the agency experienced in accommodating the § 7 rights of unions and the property rights of employers in the context of a labor dispute* . . . . [436 U.S. at 207; emphasis added.]

Precisely for this reason the Court stated its ultimate conclusion in *Sears* as follows:

> *As long as the union has a fair opportunity to present the protection issue to the Labor Board, it retains meaningful protection against the risk of error in a state tribunal.* In this case, the Union failed to invoke the jurisdiction of the Labor Board and Sears had no right to invoke that jurisdiction, and could not even precipitate its exercise without resort to self-help. Because the assertion of state jurisdiction in a case of this kind does not create a significant

> risk of prohibition of protected conduct, we are unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action. [436 U.S. at 207; emphasis added.]

Sears thus makes clear that in cases like the instant one—*in which the picketing union has invoked the NLRB's jurisdiction*—the state courts' jurisdiction to enjoin peaceful picketing *is* preempted. In such cases, unlike in *Sears*, there is a risk—indeed, a certainty—"of overlapping jurisdiction" as the very question presented to the state courts is also being presented to the NLRB. And, as *Sears* makes clear, "when the same controversy may be presented to the state court or the NLRB, *it must be presented to the Board.*" Indeed, in cases like the instant one, the very fact that the union has invoked the NLRB's jurisdiction—and that the General Counsel has issued a complaint on the union's behalf—indicates that "there is a strong argument that the trespass is protected." That being so, allowing the state-court action to proceed poses a real danger that "state courts will . . . enjoin a trespass that the Board would have protected."

In sum, the lesson of *Sears* is unmistakable: *where a picketing union invokes the NLRB's jurisdiction, "the protection question" is to be "decided by the agency experienced in accommodating the § 7 rights of unions and the property rights of employers."* 436 U.S. at 207.

2. In light of the foregoing, it is not at all surprising that—contrary to petitioners' assertion—the state courts are consistent in holding that *the jurisdiction to issue trespass injunctions is preempted once the NLRB's jurisdiction has been invoked.*

The court below cited three such decisions. *See* Pet. App. B-14. Our research has disclosed five others. *See People v. McKinney*, 514 N.Y.S. 2d 853 (N.Y. Crim. Ct. 1987); *Giant Food Stores v. UFCW Local 1357*, 120 LRRM 2025 (Pa. Ct. of Common Pleas, 1985); *affirmed*,

356 Pa. Super. 622, 512 A.2d 1293 (1986); *appeal denied per curiam*, 514 Pa. 631, 522 A.2d 559 (1987); *Brown Jug, Inc. v. Teamsters*, 688 P.2d 932 (Al. 1984) (dictum); *Retail Store Employees Local 655 v. Black*, 603 S.W.2d 676 (Mo. Ct. App. 1980).

So far as we can find, the sum total of cases on petitioners' side of the ledger is a single decision by an intermediate Maryland court. *See Weis Markets, Inc.* v. *Food and Commercial Workers Local 400*, 85 Md. App. 284, 583 A.2d 1092 (1991).[1] For three reasons, *Weis Markets* does not generate a sufficient conflict to warrant this Court's attention.

First, although the union in *Weis Markets* had, in fact, invoked the NLRB's jurisdiction, the Maryland intermediate court did not even discuss that fact in its two-paragraph analysis. *Second*, that court adopted a proposition that not even petitioners here seek to defend: *viz.* that *Sears* holds that there is no preemption in a case in which the union *does* invoke the NLRB's jurisdiction and that *Sears* is thus "dispositive of the preemption claim" in such cases. *Third*, *Weis Markets* was ultimately remanded to the trial court to decide whether, as a matter of state law, an injunction was appropriate. Thus, the *Weis Markets* ruling on the preemption issue is interlocutory which further diminishes its minimal precedential value.

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[1] The court below cited *Smitty's Super Markets v. Local 322*, 637 S.W. 2d 148 (Mo. Ct. App. 1982) as a "contra" holding. But in that case, the Missouri Court of Appeals upheld the lower court's jurisdiction because the union there did *not* file an unfair labor practice charge until "after the temporary injunction was issued." *Smitty's Super Markets* expressly states that the decision "followed" *Retail Store Employees v. Black, supra*, which squarely holds that state-court jurisdiction to issue such an injunction *is* preempted if an unfair labor practice charge *has been filed*. This case is like *Black* not like *Smitty's* because the Union's unfair labor practice charge was filed prior to the issuance of an injunction. Pet. App. B-4 to B-5.

Petitioners, in sum, grossly exaggerate in claiming that there are "conflicting state court decisions" as to whether the state courts have jurisdiction to issue a trespass injunction against peaceful labor picketing after the picketing union has filed a charge with the NLRB and that this asserted conflict has "left employers and labor unions with great uncertainty." Pet. 3. The reality is that there is but one aberrant intermediate court interlocutory decision, and that decision rests on a plain misreading of *Sears* and is otherwise unreasoned. Such a decision does not cast even a shadow of doubt on the correctness of the otherwise unbroken line of contrary rulings.

3. One final point needs to be made: *thirteen years* have now elapsed since *Sears* was decided and supposedly left "unresolved" the question posed here. Yet in those years there have been, so far as we have been able to determine, *less than ten reported cases* addressing this question, only half of which have reached the highest court of the state.

This is hardly a litigation record demonstrating the need for intervention by this Court. To the contrary, the paucity of decisions makes clear that the question posed here is of too little practical or doctrinal significance to warrant this Court's plenary review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 91 - 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RIESBECK FOOD MARKETS, INC.,
and ELM GROVE PROPERTIES,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL UNION 23, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF FOR THE NATIONAL GROCERS ASSOCIATION AND THE INTERNATIONAL MASS RETAIL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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August 23, 1991

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RIESBECK FOOD MARKETS, INC.,
and ELM GROVE PROPERTIES,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL UNION 23, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Appeals of West Virginia

BRIEF FOR THE NATIONAL GROCERS ASSOCIATION AND THE INTERNATIONAL MASS RETAIL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This brief *amici curiae* of the National Grocers Association ("N.G.A.") and the International Mass Retail Association

("IMRA"), with the consent of the parties, is filed in support of the petitioners.[1]

STATEMENT OF INTEREST

The N.G.A. is a nonprofit national trade association of over 2,500 retail and wholesale grocery firms operating or supplying over 50,000 independent retail grocery stores. N.G.A. members account for the sale and distribution of almost half of U.S. food and grocery products.

IMRA is a nonprofit trade association of mass retailers. IMRA's more than 100 retail members operate over 40,000 stores throughout the U.S. and generate over $150 billion in annual sales. IMRA members range in size from one-store businesses to multi-billion dollar chains operating thousands of stores throughout the nation.

N.G.A. and IMRA members operate retail stores in various physical settings, including freestanding stores, stores within shopping malls, and stores within strip shopping centers. These settings include urban, suburban and rural locations across the country. Customers generally are permitted access as business invitees to the stores and to the private property areas surrounding the stores, including parking lot areas. The success of these enterprises hinges upon the undisturbed ability of general public patrons to approach and enter the stores.

Member stores increasingly are expressing to *amici* their grave concerns about uninvited non-employee labor union agents intruding upon private property for the purpose of communicating to store customers with pickets and handbills.

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[1] On July 31, 1991 an extension of time to August 23, 1991 was granted to counsel for respondents for the filing of a brief in opposition to the petition. This brief is timely if filed on or before August 23, 1991. Letters of consent are filed with the Clerk pursuant to Rule 37.

Their concerns are that there is an inherent risk of violence in such activity, that there is a significant disruption of legitimate business activity, and that federal and state laws usually are inadequate to protect their property interests.

In the overwhelming majority of such instances, as in the instant case, the union's objective is solely informational. The typical informational message on the pickets and handbills urges customers not to patronize the store because the store does not have a labor contract with the union (or, in the case of the less frequent "area standards" picketing and handbilling, that the store does not pay wages and benefits equal to the level found in union contracts in the same geographic area). The union's informational or "area standards" message is directed exclusively to the store's customers. The picketing and handbilling typically is carried out on private property at the store entrances and parking lot areas by union agents confronting the customers with their pickets and handbills. The union in these cases generally makes no request for recognition as the bargaining agent for the store's employees, and actually has disavowed any organizational or recognitional objective whatsoever. Indeed, store employees, who are neither participants in nor targets of the union activity, would stand to lose their jobs if the union activity was successful.

Even in the absence of actual violence, the potential for serious violence causing harm to customers, employees and union agents, and for disruption of business operations, is ever present. Faced with these prospects, and with no federal forum available in which to contest the union's activity because trespassory union picketing and handbilling is not, in itself, proscribed as a specifically enumerated unfair labor practice, the employer will seek vindication of its property rights in the only forum available -- a trespass action filed in state court. The union, as in this case, will then respond by filing an unfair labor practice charge with the National Labor Relations Board (the "NLRB" or "Board"), claiming that its federal rights have been violated, in an attempt to provide a basis for arguing

before the state court that the court's jurisdiction over the trespass action was preempted by federal law at the moment the union filed the charge.

Thus, the question presented in this case of whether the Supreme Court of Appeals of West Virginia properly ruled that the petitioners' state court trespass action against the union was preempted by the National Labor Relations Act (the "Act" or "NLRA"), 29 U.S.C. § 151 *et seq.*, upon the union's mere claim that its federal rights were violated is of vital interest to the N.G.A. and IMRA, whose members often face the need to vindicate their private property rights against non-employee trespassory union picketing and handbilling. The members of N.G.A. and IMRA are adversely affected by the West Virginia court's decision, and N.G.A. and IMRA believe that their perspective on the issue presented will assist this Court in assessing the need to review that court's decision.

SUMMARY OF ARGUMENT

The decision of the West Virginia Supreme Court of Appeals in this case raises an issue of great importance to labor-management relations and to the overlapping roles of the federal and state governments with respect to promoting industrial peace and protecting private property. N.G.A. and IMRA in this brief show that the writ of certiorari should be granted because the decision below, if left undisturbed, would leave employers facing trespassory union picketing and handbilling in a "no-man's land." Employers would have no readily available forum, state or federal, in which to vindicate their property rights, and would be forced to wait for several years before the NLRB determines whether the union was entitled to carry out any of its activities on private property.

N.G.A. and IMRA also urge that the writ be granted because the critical issue in this case is intertwined with the issue raised in *Lechmere, Inc. v. NLRB*, 914 F.2d 313 (1st Cir. 1990), cert. granted, No. 90-970, 111 S.Ct. 1305 (1991), which

is set for argument at the 1991 Term.[2] This case, and *Lechmere*, represent both sides of the dual federal-state question of the extent to which union agents are permitted to carry out trespassory picketing and handbilling activity that is arguably protected, or prohibited, by the NLRA.

Lechmere, however, as a representative of cases decided by the NLRB under the Board's balancing test in *Jean Country*, 291 NLRB No. 4 (1988), fails to represent one very significant collateral federal issue that can arise in any of the numerous *Jean Country* type cases before the NLRB. That issue is whether an employer's filing and maintenance of a trespass action against a union in state court constitutes an independent violation of Section 8(a)(1) of the Act. Because the answer to that question turns upon whether the lawsuit brought in state court has a reasonable basis within the meaning of *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), this Court's resolution of the *Sears* preemption question raised in the instant case is critical to determining the outcome of the case before NLRB as well as the case before the state court.

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[2] IMRA, together with the Chamber of Commerce of the United States of America, as *amici curiae*, has expressed its views on *Lechmere* in a brief previously filed with the Court.

ARGUMENT

I. THE WEST VIRGINIA SUPREME COURT OF APPEALS DECISION LEAVES EMPLOYERS WITH NO FORUM FOR TIMELY VINDICATION OF THEIR PROPERTY RIGHTS AND MISCONSTRUES THIS COURT'S PREEMPTION RULING IN *SEARS*.

The basic issue in this case is whether invoking NLRB jurisdiction by the mere filing of an unfair labor practice charge by a labor union engaged in non-employee, trespassory, informational picketing and handbilling automatically establishes federal preemption of a trespass action initiated and maintained in state court by the adversely affected employer. In *Sears, Roebuck & Co., v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), the Court found no federal preemption of a state court trespass action against area standards picketing by a union on an employer's private property, even though the union's activity was arguably protected by the NLRA.

In *Sears*, unlike the instant case, the union had not sought to invoke the Board's jurisdiction by filing an unfair labor practice charge against the employer. Nonetheless, the basis of the Court's decision appears fully applicable here -- that the controversy presented to the state forum by the employer was not the same as the issue that could have been presented by the union to the NLRB. Thus, the test for federal preemption established in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), had not been met. This explanation of the basis for the Court's holding in Sears was summarized more recently by the Court in *Belknap, Inc. v. Hale*, 463 U.S. 491, (1983), as follows:

> ... we held [in *Sears*] that a state trespass action was permissible and not preempted, since the action concerned only the *location* of the picketing while the

> arguable unfair labor practice would focus on the *object* of the picketing. In that case we emphasized that a critical inquiry in applying the *Garmon* rules, where the conduct at issue in the state litigation is said to be arguably prohibited by the Act and hence within the exclusive jurisdiction of the NLRB, is whether the controversy presented to the state court is identical with that which could be presented to the Board. There the state court and Board controversies could not fairly be called identical. *Id.* at 510. (emphasis added).

The West Virginia Supreme Court of Appeals, in a split decision, erroneously construed the *Sears* decision as calling for a finding that the petitioners' state court trespass action was preempted by the NLRA merely upon the lodging of a charge by the union with the General Counsel of the NLRB.[3] As in *Sears*, the issues before the state court and the NLRB were not identical. The state court's jurisdiction over the trespass action challenging only the location of the union activity, therefore, should not be deemed to be preempted at that point, or at any point before the NLRB issues a final decision on the merits of the case.

Principles of federalism mean that there must be a reasonable accommodation of the role of state courts in protecting private property rights in the first instance. Affirming the jurisdiction of state courts over trespass claims, even where the union activity ultimately might be found to enjoy federal protection, poses only a minor risk of improper interference with legitimate union activity because such activity, when conducted on private property, is only rarely to be accorded protection

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[3] The great majority of unfair labor practice charges are either withdrawn or administratively dismissed. In fiscal years 1988 and 1989, only 37 percent of unfair labor practice charges were found to have merit and warrant issuance of a complaint by the General Counsel. *54th Annual Report of the National Labor Relations Board*, U.S. Government Printing Office, 1991, p. 6.

under the Act.[4] The Board should and will decide whether the union's non-employee informational picketing and handbilling activity is protected by Section 7 of the Act; the state court, however, should not be deprived of jurisdiction in the meantime to decide whether the *location* is permissible under the particular circumstances of the case before it.[5]

The West Virginia court's decision leaves the employer with no readily available forum either to vindicate its property rights or to determine whether the union's trespassory activity was protected by the NLRA. The Act's proscriptions against certain conduct by labor organizations do not include the type of action at issue in this case. Accordingly, there is no action against trespassory union picketing or handbilling in itself that an employer can bring against the union before the NLRB, leaving the employer to resort to self-help measures and to face the prospect of a potentially violent dispute on the employer's property. Only by attempting to remove the union agents, and only if the union then responds by filing unfair labor practice charges with the NLRB, may the issue of the union's rights under the Act possibly be decided by the NLRB.

Whether unfair labor practice charges are filed is exclusively in the hands of the union. Moreover, even if proceedings against the employer are instituted by the agency's General Counsel upon a charge filed by the union, it may well be two or more years before a final NLRB decision on the

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[4] *Sears*, 436 U.S. at 205.

[5] In cases where there are unusual and compelling circumstances which cause the NLRB to believe that the exercise of state court jurisdiction over union activity is improper, the Board, prior to issuance of its final decision on the merits of the case before it, can authorize the General Counsel to seek an injunction in a federal district court against the state action under Section 10(j) of the Act. *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971).

merits is issued.[6] In the meantime, the employer will have been unable to take any legal action anywhere to vindicate its property rights. This is precisely the "no-man's land" foreseen by Justice Powell in his separate concurring opinion in *Sears*.

Justice Powell's concurrence in *Sears* emphasized the danger of violence inherent in precluding state adjudication of an employer's complaint against trespassory union picketing. *Sears*, 436 U.S. at 212-13. The circumstances of the instant case clearly demonstrate the reality of the dilemma foreseen by Justice Powell. Following the filing of unfair labor practice charges by the union in this case, the General Counsel spent *more than one year* investigating the case before deciding to issue a complaint against the employer. The unfair labor practice case is still pending before the Board, nearly *three years* since the charge was filed on September 19, 1988.

N.G.A. and IMRA submit that the circumstances of this case vividly illustrate the "no-man's land" problem described by Justice Powell and the urgent need for a resolution by this Court of the critical preemption issue that this case presents.

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[6] NLRB data show that the median average of elapsed time from the filing of an unfair practice charge until the issuance of a final decision by the Board, is more than two years. *54th Annual Report of the National Labor Relations Board*, note 3, *supra*, p. 249.

II. A WRIT OF CERTIORARI SHOULD ISSUE IN THIS CASE IN ORDER TO RECONCILE STATE COURT JURISDICTION OVER TRESPASS ACTIONS AND NLRB ENFORCEMENT OF EMPLOYEE SECTION 7 RIGHTS

A. The NLRB's *Jean Country* Cases Involve Charges Against Employers for Maintaining State Court Lawsuits Challenging the Location of Union Activity.

Amici also wish to draw the Court's attention to another important aspect of the interplay between the critical *Sears* question raised in the instant case and the problems facing employers in corresponding *Jean Country* cases, of which the pending *Lechmere* case is a limited example. Although not at issue in *Lechmere*, virtually any *Jean Country* trespassory union activity case before the NLRB potentially involves the circumstance in which the employer will have attempted to vindicate its property rights through a trespass action in state court, and the question of whether that action in itself will be found to be a violation of the NLRA. That is exactly the circumstance of the instant case.

The petitioner Riesbeck Food Markets, Inc., as respondent in the corresponding unfair labor practice case before the NLRB,[7] is charged with having committed a violation of Section 8(a)(1) of the Act by filing a trespass action against the union in state court seeking the removal of union agents from private property, and by maintaining the lawsuit after the unfair labor practice charge was filed by the union. In the General Counsel's view, the lawsuit was preempted at that point.

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[7] *Riesbeck Food Markets, Inc.*, Case Nos. 8-CA-21274, 8-CA-22332, ALJ slip op. January 28, 1991, transferred to and continued before the Board, pending as of the date of this brief.

Whether the NLRB rules in favor of the General Counsel and the union on such charges largely depends upon the Board's determination of whether the employer's filing and maintenance of the state trespass action against the union was preempted merely by the union's filing of an unfair labor practice charge against the employer. The Board has recently considered that question in *Giant Food Stores, Inc.*, 295 NLRB No. 38 (1989), *motion for reconsideration denied*, 298 NLRB No. 50 (1990). The Board in *Giant* explained that it would apply the Court's analytical framework in *Bill Johnson's Restaurants*, as follows:

> In *Bill Johnson's Restaurants*, above, the Supreme Court, while acknowledging that lawsuits filed by employers may be powerful instruments of coercion or retaliation, nonetheless found that the first amendment right of access to the courts and the States' compelling interest in maintaining domestic peace prohibited the Board from enjoining as an unfair labor practice a well-grounded lawsuit regardless of the employer's motivation in filing it. The Court indicated, however, that the Board was empowered to enjoin a lawsuit that lacks a reasonable basis if the lawsuit was filed with the intent to retaliate against employees exercising their rights under the Act.
>
> The Court further indicated that when confronted with an allegation that the filing and prosecution of a lawsuit violates the Act, the Board first must determine whether the suit has a "reasonable basis." (footnote omitted). If it is found that the suit lacks a reasonable basis, the Board may then proceed with the unfair labor practice proceeding and determine whether the suit was filed with a retaliatory motive. Should the Board determine that the suit has a reasonable basis, however, then the Board may not enjoin the suit, but must stay its unfair labor practice proceeding until the state court suit has been concluded. The Court further stated that

> if the state court ultimately finds merit in the employer's suit, the employer should also prevail before the Board because the filing of a meritorious lawsuit, even if filed for a retaliatory purpose, is not an unfair labor practice. Finally, the Court indicated that if the state court judgment goes against the employer or the suit is 'withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the ... unfair labor practice case.' *Bill Johnson's Restaurants*, 461 U.S. at 747.

295 NLRB No. 38, at 10-11.

In *Giant*, the employer had filed a trespass action against a union, in response to which the union filed an unfair labor practice charge. The NLRB General Counsel issued a complaint on the grounds that the employer's lawsuit had no reasonable basis because it was preempted and, therefore, under *Bill Johnson's* constituted a violation of the NLRA. The state court trespass lawsuit was pending on appeal at the time of the NLRB decision, in which the Board rejected the General Counsel's contention. Citing *Longshoremen v. Davis*, 476 U.S. 380 (1986), concerning the Court's instruction that a preemption claim against state court jurisdiction must be decided by the state court, the Board stated:

> Because the state court was obligated to consider the preemption claim once it was raised by the union, it cannot be said that the litigation of that issue or the subsequent appeal of the state court's resolution of the issue, without more, lacked a reasonable basis.

295 NLRB No. 38, at 12 (footnote omitted).

Despite the Board's decision in *Giant*, in the NLRB case against petitioner Riesbeck Food Markets pending before the

Board, the General Counsel contends that the mere filing of the union's charge was sufficient to establish federal preemption of Riesbeck's state court lawsuit and that, under the *Bill Johnson's* analysis, the maintenance of the lawsuit is a violation of the Act. Notwithstanding the decision of the West Virginia Supreme Court of Appeals (which issued subsequent to the Administrative Law Judge's recommended decision in the NLRB case[8]), Riesbeck contends before the Board that its state court lawsuit had a reasonable basis and that, in any event, it had no retaliatory motive.

Granting the writ in this case and clarifying the circumstances under which the *Sears* preemption principles apply would serve the important ancillary purpose of resolving the confusion at the NLRB, where the General Counsel persists in his prosecutorial view, and there appears to be no clear majority view among the Members of the Board. In *Giant*, Chairman Stephens, in a footnote concerning Justice Powell's concurrence in *Sears*, stated in part:

> It cannot be said at this point that the Respondents acted without reasonable basis in attempting to persuade the state court that it should follow the reasoning of Justice Powell's concurring opinion in Sears, which took the view that state court jurisdiction over trespassory area standards picketing was not automatically preempted on the filing of an unfair labor practice charge with the Board challenging the exclusion of the pickets.

295 NLRB No. 38, fn. 13.

No other Board Member expressed a specific view with respect to the applicability and interpretation of the *Sears* test. Moreover, two other Board decisions, one issued before and

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[8] *Supra*, note 7.

one after *Giant*, appear to contradict *Giant* by holding that the employer's cause of action in state court was preempted by federal law and, as such, was unlawful under the NLRA. *American Pacific Concrete Pipe Co., Inc.*, 292 NLRB No. 133 (1989), and *Summitville Tiles, Inc.*, 300 NLRB No. 9 (1990).

Thus, the preemption question presented in the instant case is critical to determining the circumstances in which state courts may exercise jurisdiction over trespassory non-employee union informational picketing and handbilling. It also has an important and direct bearing on whether an employer's state court action against such union activity is deemed to constitute an independent violation of Section 8(a)(1) of the NLRA, a question that may arise in virtually every *Jean Country* type of case before the NLRB.

B. The Board's Application of *Babcock & Wilcox* Principles, Even if Properly Restricted, Will Not Eliminate the Need for Employer Access to State Courts for Injunctive Relief, Nor the Interplay Between the NLRB and State Courts.

The legality of trespassory union activity has been, and no doubt will continue to be, an important and recurring problem under both federal and state law. The enforcement of the respective rights of employers, employees and unions in such circumstances has been the subject of several important decisions of this Court in addition to *Sears*.[9] The Court's consideration of the Board's *Jean Country* test as applied in *Lechmere*, coupled with consideration of the inextricably interwoven preemption question squarely presented in the instant case, would provide a much needed clarification of the

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[9] *NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Hudgens v. NLRB*, 424 U.S. 507 (1976).

applicable law to the parties, to the NLRB, and to lower courts.

Even in the event that this Court in *Lechmere* restricts the NLRB's interpretation of union access rules under *Babcock & Wilcox*, as urged by the petitioner and *amici* in support of petitioner in that case, future cases, fact bound as they are, necessarily will be determined ultimately on the totality of their particular circumstances. Those circumstances, and their significance, may vary considerably from case to case, especially in light of the Court's conclusion in *Hudgens* that Section 7 rights and property rights occur across a broad spectrum. 424 U.S. at 522. As such, labor organizations and employers in future cases inevitably will differ on the interpretation of their respective rights under both federal and state law.[10] It is illustrative that *Lechmere* involves a question of whether trespassory union activity is protected by Section 7 of the Act in the context of the union's *organizational* objectives, whereas most cases arising under the NLRB's *Jean Country* analysis, as in the instant case, merely involve a union's "*area standards*" or *informational* objectives. It is certain that employer and union claims will continue to conflict and that employers, if they are to have any relief from the "no-man's land" dilemma, are equally certain to require resort to state courts in order to protect their property rights against trespassory activity.

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[10] As this Court has stated in *Sears*, area standards picketing entails only a very limited Section 7 right, in that it has no "vital link to the employees located on the employer's property." 436 U.S. 207 fn. 42. N.G.A. and IMRA, as *amici curiae*, believe that, as in this case, where non-employee trespassory union picketing and handbilling has solely an *informational* objective and is primarily requesting the public not to patronize the targeted employer, the connection to any *employee* rights protected by Section 7 is so much more attenuated as to deserve even less protection under the Act. Although that issue is not present on the facts of *Lechmere*, it is presented by the facts and circumstances of the instant case.

Whatever the outcome in *Lechmere*, which *amici* urge should be considered by the Court in conjunction with the instant case, it is readily apparent that the proper roles of the NLRB and of the state judiciary in our federal system will remain a key issue for all parties involved in trespassory union activity. The NLRB and the state courts in particular require further guidance from this Court.

CONCLUSION

It is essential that the decision of the Supreme Court of Appeals of West Virginia be reviewed and that the application of the Court's preemption principles of *Sears* be clarified. The question presented is a matter of great importance to labor-management relations, to the administration and enforcement of the NLRA, and to the judiciary of every state. It should, therefore, be set for argument consecutively with *Lechmere*, No. 90-970, and be decided by this Court.

Respectfully submitted,

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(4)

No. 91-15

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RIESBECK FOOD MARKETS, INC.,
and ELM GROVE PROPERTIES, INC.,

Petitioners,

v.

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL UNION 23, *et al.*,

Respondents.

BRIEF OF *AMICUS CURIAE* CENTER ON NATIONAL LABOR POLICY, INC., IN SUPPORT OF THE PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-15

RIESBECK FOOD MARKETS, INC.,
and ELM GROVE PROPERTIES, INC.,

Petitioners,

v.

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL UNION 23, *et al.*,

Respondents.

BRIEF OF *AMICUS CURIAE* CENTER ON NATIONAL LABOR POLICY, INC., IN SUPPORT OF THE PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Center on National Labor Policy, Inc. ("Center") is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions. Briefs amicus curiae have been filed by the Center advocating the validity of this public policy interest in other cases before the Court, including, *Lehnert v. Ferris Faculty Assn., No. 89-1217; Koons Ford of Annapolis, Inc. v. NLRB*, No. 87-1305; *Breen v. ILGWU*, No. 83-1791; *Archie E. Brown v. FEC*, No. 81-1905; *Larry V. Muko, Inc. v. NLRB*, No. 80-1798; *Donald Schriver, et al. v. Pennsylvania Building and Con-*

struction Trades Council, No. 80-1257; *and New York Telephone Co. v. N.Y.S. Dept. of Labor*, No. 77-961.

The parties to the instant case are primarily focusing on the important constitutional and judicial review aspects under the National Labor Relations Act. Equally important, however, is the underlying substantive claim made by Petitioner and dismissed by the Supreme Court of Appeals of West Virginia — that enumerated public policy interests will cause a divergence in the application of the state trespass litigation-resolving-analysis imposed by this Court previously in cases involving the National Labor Relations Board under the National Labor Relations Act ("NLRA").

A continuing subject of concern for the Center is the failure of national labor policy to make a reasonable accommodation of the rights and needs of small businessmen. While there is a popular misconception of labor-management relations as consisting of a struggle between workers and the large corporations that employ them, the majority of workers in the United States are employed by small businesses and have a close personal relationship with their employer. However, the misconception has resulted in a balancing of the interests of million member unions and multi-million dollar enterprises with little regard being given to the interests of the general public and small businesses.

In the context of this case, small businesses simply cannot survive a three year wait for the National Labor Relations Board to make a decision.[1] A national labor policy that would remove

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[1]On several occasions, the Center has represented the owners of small businesses in matters subject to the NLRA. That representation has occurred in several fora, including this Court. One of those cases, *Gasaway v. Laborers Pension Fund*, 793 F.2d 1296 (7th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987), is particularly illustrative of the problems that can arise from the imbalance of power between small businesses and huge unions. Mr. Gasaway was the twenty year old owner of a small paving company, on his first commercial job, when representatives of locals of the Laborers, the Teamsters, the Operating Engineers, the Carpenters and the Electricians unions demanded that he sign their contracts and pay union dues in order to continue working on the project.

jurisdiction from the only forum that can provide an effective remedy for illegal trespassory activity - state court - is a consequence almost certainly not condoned under the NLRA (the instant issue). This outcome would be seriously flawed and contrary to what Congress must have intended.

The Center on National Labor Policy can thus bring to this case a diverse perspective not presently represented. Therefore, the Center's participation will assist the Court in obtaining full consideration of the public-interest issues.

ISSUE PRESENTED

Whether the mere filing of a charge against an employer with the General Counsel of the National Labor Relations Board ("the Board" or "NLRB") preempts the employer's state court trespass action against a union's trespassory informational picketing and handbilling, thereby leaving the employer, pending the exhaustion of NLRB procedures, with no federal or state forum in which to vindicate its property rights.

SUMMARY OF ARGUMENT

The Court has established, in *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U. S. 180 (1978), that the tort of trespass is included in the category of activities that are so strongly linked to "local feeling and responsibility," that pre-emption will not apply. However, in *Sears*, the Court specifically left open the question whether state court jurisdiction would be ousted if a union filed an unfair labor practice charge after being asked to leave the employer's premises. That issue was sharply contested in concurring opinions that were issued by Justices Blackmun and Powell, with Justice Blackmun insisting that pre-emption would arise immediately upon the filing of a ULP and Justice Powell responding that such an approach would create a "jurisdictional no-man's land" which could not have been intended by Congress.

The state courts that have addressed the question subsequent to *Sears* have split dramatically. Thus leading to the incongruous result of the pre-emption doctrine, which is intended to support uniformity of national labor policy, creating substantial differences in the rights available to an employer based solely on the location of his property.

The application of the principles established in the Court's pre-emption cases leads to the conclusion that state courts have jurisdiction to hear a suit based on a violation of state trespass laws. The inquiry must include a balancing of the strength of the rights asserted by the employer and the union and consideration of the likelihood of interference with a national labor policy.

An inquiry into the likelihood of interference with national labor policy reveals that it is extremely unlikely that a problem would arise. First, as the Court has noted, the union area-standards activity in question is almost never protected under the NLRA and, therefore, whatever a state court does will not impact the federal labor law at all. Secondly, *Sears* established that state courts are permitted to resolve trespass disputes where no ULP is filed: they are already making decisions in the area. Finally, as the split in the state courts demonstrates, some states are currently hearing trespass actions even after a ULP is filed. There has been no showing of harm arising from their retention of jurisdiction.

The Court should be careful to avoid an interpretation of the Act that would infringe important constitutional rights. Consideration of this right led the Court to severely limit the Board's ability to interfere with a state court action in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

The Court's decisions in *Sears* and *Bill Johnson's Restaurants* combine to establish an orderly system that commits the resolution of tortious disputes to state courts. This system avoids the possibility of a "jurisdictional no-man's land" arising and places responsibility on the only forum that is able to provide complete relief in a timely manner. Only a writ of *certiorari* granted at this juncture in the development of federal labor law will ensure that this prospect does not occur.

ARGUMENT

I. PRE-EMPTION DOES NOT ARISE IN CASES WHERE A UNION ENGAGES IN UNLAWFUL TRESPASSORY INFORMATIONAL PICKETING AND FILES AN UNFAIR LABOR PRACTICE CHARGE ONLY AFTER AN EMPLOYER BRINGS SUIT IN STATE COURT TO ENJOIN THE UNLAWFUL ACTIVITY. STATE COURTS RETAIN JURISDICTION BECAUSE SUCH ACTIVITY IS "DEEPLY ROOTED IN LOCAL FEELING AND RESPONSIBILITY" AND THERE IS LITTLE LIKELIHOOD OF INTERFERENCE WITH NATIONAL LABOR POLICY.

The essence of the pre-emption doctrine is that state courts do not have jurisdiction to address the legality of activity that is arguably within the protection or the prohibition of §§ 7 or 8 of the NLRA, 29 U.S.C. §§ 157, 158. However, in *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957), this Court evaluated its previous decisions and Congressional intent and established that pre-emption does not preclude a state from providing a civil remedy for tortious conduct that arises in the context of a labor dispute.

In *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U. S. 180 (1978), the Court applied the principles of *Garmon* and determined that state courts have jurisdiction to address the legality of trespassory aspects of a union's picketing when an employer who has no way to invoke the jurisdiction of the National Labor Relations Board ("the Board" or "NLRB") files a lawsuit under state law. Because the union involved in *Sears* had not filed an unfair labor practice charge ("ULP"), the Court left open the question whether the filing of a ULP subsequent to the filing of the state suit would serve to pre-empt state jurisdiction.

However, in separate concurring opinions, Justices Blackmun and Powell addressed that question and reached opposite conclusions. Justice Blackmun concluded that "if a union timely files a

§ 8(a)(1) charge,[2] a state court would be bound to stay any pending injunctive or damages suit brought by the employer until the Board has concluded, or the General Counsel by refusal to issue a complaint has indicated, that the picketing is not protected by § 7." *Id.* at 209.

Justice Powell disagreed, primarily out of concern that the pre-emption of state jurisdiction would result in a "no-man's land" of jurisdiction during which no state or federal forum would be able to provide relief from an illegal trespass. Justice Powell suggested that "it may take weeks for the General Counsel to decide whether to issue a complaint," during which time, neither the Board nor the state courts would have jurisdiction to afford relief to the employer. Justice Powell concluded that he was "unwilling to believe that Congress intended, by its silence in the Act, to create a situation where there is no forum to which the parties may turn for orderly interim relief in the face of a potentially explosive situation." Id., at 213.

More recently, in *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 451 n.7 (1989), the Court appears to have further refined its analysis of the pre-emption issue. There the Court concluded that the pre-emption doctrine rests upon a primary jurisdiction analysis in circumstances where the "injured" party has an effective right of redress before the Board. Citing to three cases, *Sears*, 436 U.S. at 193-98, *Belknap v. Hale*, 463 U.S. 491, 510 (1983), and *Longshoremen v. Davis*, 476 U.S. 380, 393 N.10 (1986), the Court explained:

> *Garmon* pre-emption divests a state court of jurisdiction over actions where the state law prohibits the same conduct that is arguably prohibited by the NLRA,..., and actions involving conduct arguably protected under the NLRA *provided the injured party has a means of bringing the dispute before the Board.*

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[2]Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), makes it an "unfair labor practice for an employer-(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

(Emphasis added).

State courts that have addressed the question subsequent to *Sears* have split in their resolution of it. Courts that have determined that pre-emption arises, in addition to the instant case, include *Shirley v. Retail Store Employees Union*, 225 Kan. 470, 592 P. 2d 433 (1979); *Cross Country Inn, Inc. v. South Central District Council, Carpenters*, 50 Ohio App. 3d 8, 552 N.E. 2d 232 (1989); and *Wiggins & Co., Inc. v. Retail Clerks Union Local No. 1557*, 595 S.W. 2d 802 (Tenn. 1980). Courts reaching an opposite conclusion include *Weis Markets, Inc. v. United Food and Commercial Workers*, Local 400, 85 Md. App. 284, 583 A. 2d 1092 (1991); and *Smitty's Super Markets, Inc. v. Retail store Employees Local 322*, 637 S.W. 2d 148 (Mo. App. 1982). Also, see *May Department Stores Co. v. Teamsters*, 64 Ill. 2d 153, 355 N.E. 2d 7 (1976), cited by Justice Powell in his concurrence.

Amicus believes that the courts that have held that pre-emption arises under these facts have misconstrued this Court's decisions on pre-emption. This Court has steadfastly "refused to apply the Garmon guidelines in a literal, mechanical fashion," *Sears*, 436 U. S., at 188, but, rather, "the Court has construed the Act as not pre-empting the States from providing a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility.'" *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983), citing *Garmon*, 359 U.S. at 244. In short, the Court has taken care to preserve for states the right to maintain domestic peace through the administration of its judicial system. This is the essence of the Court's allowance of concurrent jurisdiction in *Sears*, 436 U.S. at 199.

As Justice Neely in his dissenting opinion in the court below explained, where a jurisdictional no-man's land exists, it becomes likely that the only manner for a property owner to its protect ostensible state property rights would be to use the "ungood" methods of self-help (in labor law parlance) which inevitably leads to rapid escalation of "ungood" acts, violence and the assured destruction of both party's rights, including the public's right to peace and safety. Pet. App. B-20. As the Court further interpreted in *Golden State Transit Corp.*, 110 S. Ct. at 451-52, it was the express view of Congress to compel an orderly resolution

of grievances, but not to allow preemption where resort to the federal statutory scheme would be contrary to that goal:

> The *Machinists* [*v. Wisconsin Employment Relations Comm.*, 427 U.S. 132 (1972)] rule is not designed-as is the *Garmon* rule-to answer the question whether state or federal regulations should apply to certain conduct. Rather, it is more akin to a rule that denies sovereign authority to abridge a personal liberty....the interest in being free of governmental regulation of the 'peaceful methods of putting economic pressure upon one another. (Citations omitted)"[3]

The Court's decisions in *Sears* and *Bill Johnson's Restaurants* establish the procedures that an employer should follow in response to illegal picketing and place limits on the Board's ability to interfere with the state court proceedings that the Court recommends. In *Sears*, 436 U.S. at 202, the Court concluded that employers have three options when confronted by an illegal

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[3]National Labor Relations Board jurisprudence has always considered the real property right in a *de minimis* manner. *See e.g. Jean Country*, 291 N.L.R.B. No. 4 (1988). Yet, a business employer's ownership of property includes the right to control, protect, and defend the boundaries of its possession. *Green v. Biddle*, 21 U.S. 1 (1823) (trespass quare clausum fregit). Its business is itself a property right. *Truax v. Corrigan*, 257 U.S. 312, 327 (1921).

In the present case, the employer's property interest includes the exclusive use of his property to return an economic profit. Notably, the Board's calculus has never considered the financial cost to the property owner by commanding union access. Neither does it consider the confusion caused to the customers who were cultivated by the employer through the expenditure of considerable advertising money. This "volatile influence on certain audiences" of picketing, is the tangible fact that it "involves customers' annoyance and a consequent loss of sales for management," Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 Minn. L. Rev. 505, 507-08 (1965), and other expenses, *e.g.*, security, littering, maintenance, accident liability, and added insurance costs.

trespass and advised employers on how to respond to their choices. First, they have no obligation to permit the trespass to continue. However, the Court also discouraged resort to self-help measures to terminate the trespass. In the Court's view, this left "proceeding in state court" as the only means for an employer to"obtain an orderly resolution of the question whether the union had an federal right to remain on its property.

Having explained where the employer should go to seek redress of a civil grievance, in *Bill Johnson's Restaurants* the Court then explained that the NLRB is not entitled to interfere with the employer's choice.

In Bill Johnson's Restaurant's, several employees exercised their right to engage in organizational activity that was protected by the NLRA.[4] One of the defendants filed a charge with the NLRB, alleging that the lawsuit had been filed in retaliation against the defendants because they had engaged in protected activities and claiming that the filing of the suit therefore constituted a ULP. The General Counsel issued a complaint and, after a hearing by an administrative law judge, the Board issued an order that required that the employer withdraw his state court lawsuit and pay the defendants for all their legal expenses incurred in connection with the lawsuit. The Court of Appeals enforced the Board's order in its entirety.

On *certiorari*, this Court held that "the Board may not normally halt the prosecution of a state court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law. Retaliatory motive and lack of a reasonable basis

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[4]The employer threatened to "get even" with them "if it's the last thing I do." Subsequently, the employer filed a civil lawsuit which included allegations that the defendants had engaged in mass picketing, harassed customers, blocked public ingress to and egress from the restaurant and created a threat to the public safety. The suit also included a claim of libel.

are both essential prerequisites to the issuance of a cease-and-desist order against a state suit." 461 U.S. at 748-749.[5]

The Court based its holding on the combined "weighty countervailing considerations" of the employer's First Amendment right of access to the courts to petition the government for the redress of grievances and on the state's interest in maintaining order. The Court also clearly stated that the prevention of continuing trespass is one of the areas in which a state court's jurisdiction may not be ousted:

> In recognition of the States compelling interest in the maintenance of domestic peace, the Court has construed the Act as not pre-empting the States from providing a civil remedy for conduct touching interests "deeply rooted in local feeling and responsibility." [*Garmon*]. It has therefore repeatedly been held that an employer has the right to seek local judicial protection from tortious conduct during a labor dispute. *See, e.g., Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978).

Bill Johnson's Restaurants, 461 U.S. at 741-742.

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[5]In *Francis W. Hoeber v. Local 30, United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Assn.*, 1991 U.S. App. LEXIS 16731 (3d Cir. July 30, 1991), the court affirmed a denial of a § 10(l) injunction requested by the Board to stop an independent lawsuit while the Board was considering an unfair labor practice complaint. The district court affirmed the denial of relief to the Board for this purpose for three reasons. "First, the Congressional purpose behind the enactment of § 10(l) was not to enjoin legal action, but was rather to enjoin clear obstacles and impediments to business, such as strikes, pickets, and boycotts." *Id.* at 11. Second, the lawsuit "did not create the degree of harm necessary to justify an injunction. Moreover, the Supreme Court has required restraint on the part of federal courts in enjoining lawsuits. The filing of a lawsuit carries significant constitutional protections, implicating the First Amendment right to petition the government for redress of grievances, and the right of access to courts." *Id.* at 12-13.

The framework thus established by the Court provides an orderly system for maintaining the public peace and removes the possibility of a "jurisdictional no-man's land." Once a state court has taken jurisdiction of a state law tort claim the Board has no authority to oust its jurisdiction. However, the Board may clearly intervene in the judicial action to protect its jurisdiction and urge dismissal of relevant counts that intrude on its exclusive jurisdiction. This it does when it percieves the need to be great. *See UFCW Local 400 v. Marval Decertification Comm, 708 F. Supp. 761 (W.D. Va. 1989)* (Board intervened urging federal court dismissal of § 301 Count, deferral to the Board on a § 302 Count, and abeyance pending Board ruling on a third RICO Count, where union filed lawsuit against workers for seeking to decertify the union). This system commits the maintenance of order to the forum that is familiar with the relevant law, and that is equipped to provide full relief in a timely manner.

An additional factor that supports the conclusion that states are not pre-empted from retaining jurisdiction in an action against trespass is the balance between the strong right to the use of real property and the relatively weak § 7 rights that are being asserted in informational picketing and handbilling. The Court has consistently supported the retention of property rights in cases such as *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956). In contrast, the Court noted in *Sears* that informational picketing "would be unprotected in most instances." 436 U.S. at 206. Recognition of that fact strengthens the conclusion that pre-emption is inappropriate since there is a lesser likelihood of interference with national labor policy.

Due to the exceptional disparity in the state court's and the federal court's on this issue, a writ of *certiorari* should be granted to resolve this important judicial conflict with the decisions of this Court.

A. UNLAWFUL TRESPASSORY PICKETING IS AN OFFENSE WHICH FALLS SQUARELY WITHIN THE EXCEPTION TO PREEMPTION FOR CONDUCT THAT TOUCHES LOCAL FEELING AND RESPONSIBILITY

The right of a state to uphold its civil laws over labor related tortious conduct has been recognized in numerous cases, including *Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954) (violence); *Automobile Workers v. Russell*, 356 U.S. 634 (1958) (obstruction of access to property); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (libel); and *Farmer v. Carpenters*, 430 U.S. 290 (1977) (intentional infliction of emotional distress). The court below failed to recognize the overriding importance of state jurisdiction to the scheme of orderly resolution of matters comprising federal labor law.

In *Sears*, 436 U.S., at 188-189, the Court reiterated the test that was previously set forth in *Vaca v. Sipes*, 386 U.S. 171, 180 (1967): "the decision to pre-empt . . . state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies."

In instances of trespass for the purpose of informational picketing and handbilling, the interests that must be balanced are the employer's right to the enjoyment of his personal property and the union's right to communicate with the public. The Court has always recognized that the employer's property right is extremely strong.

In a series of cases beginning with *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956), the Court has repeatedly rejected Board approval of union trespasses. In *Babcock*, the Court upheld the employer's property right over non-employee organizers where the employer had a nondiscriminatory no solicitation policy. In *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), the Court rejected the Board's contention that because an employer permits the public to come onto his property, he forfeits his right to prohibit solicitation by non-employee organiz-

ers. Finally, in *Scott Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court refused to permit even the employees of an affiliated company to trespass to engage in "economic strike activity." From these cases, it is clear that an employer's interest in preventing a trespass on his property enjoys a high degree of deference.

In contrast, the right to conduct informational picketing is a lesser right. As the Court observed in *Sears*, 436 U.S. at 206, n. 42, "the right to organize is at the very core of the purpose for which the NLRA was enacted. Area-standards picketing, in contrast, has only recently been recognized as a § 7 right." The Court further noted that "[a]rea standards picketing. . . has no such vital link to the employees located on the employers property." *Id.*

Furthermore, the question whether trespassory picketing is a protected right was explained by the Court in *Sears*, 436 U.S. at 205 (emphasis added), in light of *Babcock & Wilcox*, *Scott Hudgens*, and *Central Hardware*, to uphold state jurisdiction because of the most unlikely possibility that such trespass would be protected:

> the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a *heavy one* is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has *rarely been in favor of trespassory organizational activity.*

Thus, it is clear from the Court's decisions that an employer's property rights would take precedence over a union's right to invade its property for the less connected activity of informational picketing. The West Virginia Supreme Court of Appeals failed to properly consider this jurisprudence in its decision that the state's jurisdiction was totally pre-empted.

There remains to consider, however, whether the application of state trespass law to informational picketing threatens to interfere with national labor policy. In considering this question, reference must be made to the guidelines found in *Sears*, 436 U.S., at 188, n. 13:

> Where only a minor aspect of the controversy presented to the state court is arguably within the regulatory jurisdiction of the Labor Board, the Court has indicated that the *Garmon* rule should not be read to require pre-emption of state jurisdiction. *Hanna Mining Co. v. Marine Engineers*, 382 U.S. 181, 86 S. Ct. 327, 15 L.Ed. 2d 254. The Court has also indicated that if the state court can ascertain the actual legal significance of particular conduct under federal law by reference to "compelling precedent applied to essentially undisputed facts," *San Diego Building Trades Council v. Garmon*, 359 U.S., at 246, 79 S. Ct., at 780, the court may properly do so and proceed to adjudicate the state cause of action.

There is little likelihood that the application of state law to trespassory informational picketing would interfere with national labor policy. First, since *Sears*, state law on trespass has been applied in instances where no ULP is filed. Second, as the Court noted in *Sears*, 436 U.S., at 206, such picketing "would be unprotected in most instances." Third, as the split on this question among the states indicates, some states are currently exercising jurisdiction even after the filing of a ULP, with no apparent disruption of national labor policy.

Thus, under the criteria established by the Court, pre-emption should not be applied under the facts of this case. *Certiorari* should be granted to settle this issue among the several states.

B. PRE-EMPTION SHOULD NOT BE APPLIED SIMPLY BECAUSE OF THE FILING OF A UNFAIR LABOR PRACTICE WITH THE BOARD

The balance of factors that was set in Sears should not be disturbed simply because of the filing of a ULP. The mere filing of a ULP offers no evidence of wrong-doing: the charge may be utterly frivolous. However, even on a frivolous charge a determination may not be made by the General Counsel or the Board for an extended period of time. In the instant case, the General Counsel took 13 months to issue a complaint after the filing of the ULP. When the complaint was issued, it included an allegation that Riesbeck's maintenance of the trespass action in state court constituted an unfair labor practice - despite this Court's declaration that the filing of such a suit is *the* appropriate course of action to pursue when an employer is confronted by trespassory informational picketing! [6] *See* Petition for Writ of Certiorari, p. 5.

In the alternative perspective, the General Counsel may not issue a complaint at all, leaving open the question whether the union activity was in fact protected under federal labor law, because the refusal to issue a complaint is not a Board ruling. In these circumstances the jurisdictional vacuum left open by the West Virginia Court's interpretation of the preemption doctrine,

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[6] "In the face of the Union's intransigence, Sears had only three options: permit the pickets to remain on its property; forcefully evict the pickets; or seek the protection of the State's trespass laws. Since the Union's conduct violated state law, Sears legitimately rejected the first option. Since the second option involved a risk of violence, *Sears surely had the right* -- perhaps even the duty -- to reject it. *Only by proceeding in state court*, therefore, could Sears obtain an orderly resolution of the question *whether the Union had a federal right to remain on its property.*"

Sears, 436 U.S. at 202 (emphasis added). *Also see Bill Johnson's Restaurants*, 461 U.S. at 741-742.

leaves neither the union nor the employer with an avenue to seek redress or consideration of its rights.[7]

Several of the Court's pre-emption cases address situations that could be the subject of a ULP, including *Farmer*, *Russell* and *Laburnum*. It would be no more appropriate to remove state court jurisdiction here than in those other instances.

II. THE COURT SHOULD INTERPRET THE NLRA TO AVOID ANY INFRINGEMENT OF AN EMPLOYER'S FIRST AMENDMENT RIGHT TO PETITION GOVERNMENT FOR THE REDRESS OF GRIEVANCES

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), the Court recognized that the First Amendment guarantee of a right to petition the government for a redress of grievances includes the right of access to the courts: "The right of access to the courts is indeed but one aspect of the right of petition." *Also McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment...."). That principle was applied to the NLRA in *Bill Johnson's Resytaurants*, 461 U.S. at 741-742. There the Court rejected an attempt by the NLRB to enjoin the prosecution in state court of a civil action which had been filed in retaliation for activity that was protected under the NLRA. In rebuffing the Board, the Court declared that "[w]e should be sensitive to these First Amendment values in construing the NLRA in the present context." Id.

The instant case presents similar concerns. As Justice Powell noted in his concurring opinion in *Sears*, the removal from state

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[7]As the Court noted in *Sears*, 436 U.S. at 198 n.28, if an employer were to file a charge, it would be likely that the Board might conclude "that the picketing was not prohibited, Sears would still be confronted with picketing which violated state law and was arguably protected by federal law. Thus, the filing of an unfair labor practice charge could initiate complex litigation which would not necessarily lead to a resolution of the problem which led to this litigation."

courts of jurisdiction to adjudicate claims of illegal trespass will be likely to result in a denial of access to a forum that is empowered to provide a remedy. Unfortunately, Justice Powell's fears pale in contrast to the reality of the instant case. Justice Powell expressed concern that the General Counsel could take weeks to determine whether a complaint would be issued, a necessary step prior to the vesting of jurisdiction in the Board. *Sears*, 436 U.S., at 212-213. In the instant case, the General Counsel took 13 months to issue his complaint, Petition for Certiorari, at p. 5. During that time, no tribunal would be empowered to provide relief from unlawful picketing if state courts were denied jurisdiction.

In a situation where relief must be granted in the very short term if it is to be effective, a delay of more than a year is effectively a complete denial of access to the courts and, therefore, an infringement of the First Amendment right to petition government.

Such a result would be particularly anomalous in a situation where, as the Court recognized in *Sears*, 436 U.S., at 205, the conduct in question is almost certainly unprotected: "a trespass is far more likely to be unprotected than protected." This conclusion, of course, derives directly from *Babcock & Wilcox* and the cases that followed it.

In *Bill Johnson's Restaurants*, 461 U.S. at 741, the Court characterized the First Amendment right to petition government, along with the interest of a state in the maintenance of its domestic peace, as "weighty countervailing considerations," that militated against the denial of access to legal redress in a state court. Those same considerations are present in the instant case. However, the considerations in favor of removing jurisdiction are virtually non-existent. Rather, as Justice Powell demonstrated in his concurring opinion in Sears, the realities of modern labor activity demand that employers be allowed access to a forum that can provide necessary relief in a timely fashion. Also, *see*

International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 202 (1970) (White, J., concurring).[8]

III. THE COURT SHOULD ISSUE A WRIT OF CERTIORARI TO FINALLY RESOLVE THE QUESTION OF PRE-EMPTION THAT WAS LEFT OPEN IN *SEARS*, WHICH HAS LED TO A SIGNIFICANT SPLIT OF OPINION IN THE STATE COURTS THAT HAVE ADDRESSED THE QUESTION. IN THE ALTERNATIVE, THE COURT SHOULD HOLD THE MATTER IN ABEYANCE, PENDING THE RESOLUTION OF *LECHMERE v. NLRB*, No. 90-970, WHICH IS CURRENTLY PENDING BEFORE THE COURT

Ironically, the current uncertainty as to the applicability *vel non* of the pre-emption doctrine to trespassory informational picketing has resulted in a significant split among the states that have addressed the question. Thus, a doctrine that is intended to provide national uniformity in the application of labor policy has led to substantial uncertainty as to the rights of employers and a wide divergence in the rights they receive. This split, standing alone, would warrant issuance of this Court's Writ of Certiorari. When it is recognized that the result of the split,in those states that have incorrectly concluded that pre-emption is appropriate, is that employers are denied the basic right of access to a forum that can provide relief for tortious activity, the need for issuance of the Writ becomes compelling.

The Court may find it convenient to consolidate this case with *Lechmere, Inc. v. NLRB*, No. 90-970, which is currently pending before this Court. That case involves issues of the legality of Board policy of permitting non-employee union

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[8] "So long as employers are effectively denied determinations by the NLRB as to whether 'arguably protected' picketing is actually protected except when an employer is willing to threaten or use force to deal with picketing, I would hold that only labor activity determined to be actually, rather than arguably, protected under federal law should be immune from state judicial control. To this extent, [Garmon] should be reconsidered." *Id.*

organizers to trespass on an employer's property. In the alternative, since *Lechmere* is fully briefed, the Court may wish to defer consideration of this petition until Lechmere is decided.

CONCLUSION

WHEREFORE, *amicus curiae* Center on National Labor Policy, Inc., respectfully requests that the petition for writ of *certiorari* should be granted to reverse the decision of the West Virginia Supreme Court of Appeals.

Respectfully submitted.

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